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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 45

JOSEPH D. McGOLDRICK, COMPTROLLER OF THE CITY OF NEW YORK, PETITIONER,

vs.

FELT & TARRANT MFG. CO.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI FILED MAY 8, 1939.

CERTIORARI GRANTED JUNE 5, 1939.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 944

JOSEPH D. McGOLDRICK, COMPTROLLER OF THE CITY OF NEW YORK, PETITIONER,

vs.

FELT & TARRANT MFG. CO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

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[fol. 1]

IN SUPREME COURT OF NEW YORK, NEW YORK COUNTY

In the Matter of the Application of FELT & TARRANT MFG. Co., Petitioner,

For an Order of Certiorari

against

FRANK J. TAYLOR, Comptroller of the City of New York, Respondent

STATEMENT UNDER RULE 234

This is a certiorari proceeding pursuant to Article 78 of the Civil Practice Act to review a final determination of the Comptroller of the City of New York, dated February 13, 1937, of an application by Felt & Tarrant Mfg. Co. for a review and reconsideration of the taxes assessed and determined against it by the Comptroller of the City of New York pursuant to Local Law #20 of 1934 (published as Local Law #21) as amended by Local Law #24 of the Laws of 1934 (published as Local Law #25), of the City of New York.

The Comptroller determined that Felt & Tarrant Mfg. Co. is liable to pay a tax of $2,587.31 and interest of $535.22, a total of $3,122.53 as a sales tax under Local Law #20, as amended by Local Law #24 of the Laws of 1934 [fol. 2] of the City of New York based on the receipts derived by Felt & Tarrant Mfg. Co. for the period from December 10, 1934 to December 31, 1935.

The Order of Certiorari was signed by Mr. Justice Charles B. McLaughlin on the 10th day of March, 1937, and simultaneously therewith Mr. Justice McLaughlin approved the bond given by Felt & Tarrant Mfg. Co. in the amount of $500.

The Comptroller made his return to the Order of Certiorari on the 15th day of April, 1937.

By stipulation dated June 30, 1938, Joseph D. McGoldrick, Comptroller of The City of New York, was made the defendant in the place of Frank J. Taylor.

Newton K. Fox, 42 Broadway, New York City, appears as attorney for Felt & Tarrant Mfg. Co.

Paul Windels, Corporation Counsel, appeared as attorney for respondent, Frank J. Taylor, Comptroller of the City of New York, but was succeeded by William C. Chanler, the present Corporation Counsel and represents the present Comptroller of The City of New York, Joseph D. McGoldrick.

[fol. 3] In Supreme Court of New York, County of New York, Special Term, Part II

[Title omitted]

Order of Certiorari—March 10, 1937

On the reading and filing the annexed petition of Felt & Tarrant Mfg. Co., verified the 8th day of March, 1937, whereby it appears that Frank J. Taylor, Comptroller of the City of New York, has assessed and collected sales taxes and penalties from the petitioner for the period December 10, 1934 to December 31, 1935, in the sum of $3,122.53, under Section 873 of the Laws of 1934 of the State of New York and under Local Law #20 of 1934, as amended, of the City of New York, and under rules and [fol. 4] regulations that the products sold by the petitioner are subject to the sales tax under said Local Law #20 of 1934, as amended, and has assessed the tax upon the receipts from customers located in New York City.

Now, on motion of Newton K. Fox, Attorney for the petitioner, it is

Ordered that Frank J. Taylor, Comptroller of the City of New York, within 20 days after the service of a certified copy of this order upon him, do certify and return to the Court by filing in the office of the Clerk of the County of New York, at the County Court House, Center and Pearl Streets, in the Borough of Manhattan, City of New York, all rules, regulations and assessments in the premises, together with all proceedings, decisions, rulings and actions in the premises, with the dates thereof respectively and of all and singular the correspondence, evidence, documents, records, exhibits and papers before him touching and concerning the taxation of the sales by petitioner as aforesaid, and whether or not said sales were consummated and made in the City of New York and are taxable under said Local

Law #20 of 1934, as amended, and the reason why said sales are held taxable under said Local Law #20, as amended, and as to whether or not said rulings, regulations and assessments unfairly discriminated against the petitioner, to the end that said decision and action may be reviewed and corrected on the merits by this Court, and any error committed in said rulings, regulations and assessments, may be corrected according to law as to the Court may seem just and proper; and it is further

[fol. 5] Ordered that petitioner file with the Comptroller of the City of New York an undertaking with a Surety Company authorized to do business in the State of New York as surety to be approved by one of the Justices of this Court in the sum of $500 to the effect that if this proceeding be dismissed or the tax confirmed, the petitioner will pay all the costs and charges which may accrue in the prosecution of this proceeding.

And, sufficient reason appearing therefor, it is further

Ordered that notice of application for this order be and it hereby is, in the discretion of the Court, dispensed with.

Enter.

C. B. McL., J. S. C.

[fol. 6] In Supreme Court of New York, New York County

[Same title]

Petition

To the Supreme Court of the State of New York:

The petitioner Felt & Tarrant Mfg. Co. respectfully says:

1. That your petitioner Felt & Tarrant Mfg. Co. at all times hereinafter mentioned was and is a corporation duly organized and existing under the laws of the State of Illinois, having its principal office and place of business at No. 1735 North Paulina Street, City of Chicago, State of Illinois, and is engaged in the business of manufacturing and selling comptometers at said City of Chicago, State of Illinois.

2. That your petitioner has never filed qualifying papers or received authority to do business in the State of New

York, and is not doing business in the City or State of New York.

3. That the respondent Frank J. Taylor is the duly elected qualified and acting Comptroller of the City of New York.

4. That the authority of the City of New York to levy and collect a sales tax is conferred by Chapter 873 of the 1934 Laws of the State of New York, approved August 18, 1934, and that Section 1 thereof provides in part as follows:

"This Act shall not authorize the imposition of a tax on [fol. 7] any transaction originating and/or consummated outside of the territorial limits of any such city, notwithstanding that some act be necessarily performed with respect to such transaction within such limits."

5. That pursuant to Chapter 873 of the laws of 1934 of the State of New York, both branches of the Municipal Assembly of the City of New York passed and the Mayor of the City of New York approved New York City Local Law #20, effective December 5, 1934, as amended by Local Law #24 effective December 28, 1934, commonly known as the sales tax law.

6. That in and by Section 1 of said Local Law #20, as amended, it was provided in part as follows:

"Section 1. Definitions.—When used in this local law:"

"(b) The word 'vendor' means a person selling property or rendering services upon the receipts from which a tax is imposed under section 2 of this local law;"

"(e) The word 'sale' or 'selling' means any transfer of title or possession or both, exchange or barter, license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, and may include the rendering of any service specified in section 2 of this local law;"

[fol. 8] 7. That in and by Section 2 of said Local Law #20, as amended, it was provided in part as follows:

"Section 2. Imposition of tax.—During the period commencing on December tenth, nineteen hundred and thirty-four, and ending on December thirty-first, nineteen hun-

dred and thirty-five, there shall be paid a tax of two per centum upon the amount of the receipts from every sale in the city of New York of:

"(a) Tangible personal property sold at retail except those articles described in schedule 'A' below;"

8. That during the period December 10, 1934 to December 31, 1935, the petitioner made sales of comptometers in interstate commerce to customers located in the City of New York which sales were made under the conditions set forth in Paragraph 9 hereof.

9. During the period December 10, 1934 to December 31, 1935, and prior and subsequent thereto, the petitioner did not maintain in the City or State of New York any manufacturing plant for the manufacture of its products or any warehouse or place from which comptometer machines could be sold to purchasers or at which a machine could be appropriated to any order received for the same. That during said period, and prior and subsequent thereto, the petitioner had solicitors operating in the City of New York to solicit and take orders for comptometer machines manufactured by the petitioner. That during said period [fol. 9] and prior and subsequent thereto, it was expressly provided in the written agreements between the petitioner and its solicitors in New York City that their authority was confined merely to soliciting orders; that all orders taken must be submitted to and approved by the petitioner at Chicago, Illinois; that all sales should be made by the petitioner; and that solicitors should not collect any moneys due upon sales and that all payments should be made direct to the petitioner at Chicago, Illinois. That during said period, and prior and subsequent thereto, the petitioner received at Chicago, Illinois, orders taken by its solicitors in New York City for comptometer machines and upon receipt of an order the same was considered and was approved or disapproved by an officer of the petitioner at Chicago, Illinois. If approved, the said order was sent to petitioner's Billing department at Chicago, Illinois, where an order was made out on which appeared the customer's name and address, the destination of the shipment and the customer's order number, if any. Said order was then sent to petitioner's shipping department and a machine or machines were allocated and appropriated to the order by the

shipping department at Chicago, Illinois, or at some other place outside of the limits of the City and State of New York. The shipping department then inserted on the order blank, in the upper right hand corner, the serial number of the individual machine or machines allocated and appropriated to the order. The machine or machines were then packed for shipment by the shipping department and [fol. 10] were shipped in interstate commerce to the customer in New York City by express, freight or motor service of a common carrier. After shipment the order was returned to the billing department where an invoice was made out for the specific machine or machines shipped and the serial number of the individual machine or machines so shipped was designated on the invoice to the customer and the invoice mailed from Chicago, Illinois, to the customer. Collections were made and remittance in payment for machines shipped were received only at Chicago, Illinois, direct from the customer. No invoices were sent out from New York City to customers and no collections from customers were made in New York City.

10. That on or about February 13, 1937, after hearings had been held, respondent purporting to act under Chapter 873 of the laws of 1934 of the State of New York and under Local Law #20 of 1934, as amended, of the City of New York, made a final determination of sales taxes alleged to be due under said Statute and under said Local Law and of the interest and penalties thereon claimed to be due from petitioner for said period December 10, 1934 to December 31, 1935, in the sum of $3,122.53.

11. That on or about February 18, 1937, the petitioner paid involuntarily and under protest and duress said taxes and penalties in the sum of $3,122.53 for the period December 10, 1934 to December 31, 1935, to the City Collector of the City of New York through the office of the respondent. A copy of said protest is attached hereto and made a part hereof as Exhibit "A".

[fol. 11] 12. That on or about March 2, 1937, the petitioner, pursuant to the provisions of section 7 of Local Law #20 of 1934, as amended, made an application in writing to the respondent for a review of his determination by certiorari. A copy of said application is attached hereto and made a part hereof as Exhibit "B".

13. That on or about March 2, 1937, petitioner pursuant to the provisions of Section 10 of Local Law #20 of 1934, as amended, made an application and claim for a refund in writing of the taxes and penalties so paid by it to respondent involuntarily and under protest and duress and that no refund thereof has been made. A copy of said application and claim for refund is attached hereto and made a part hereof as Exhibit "C".

14. Upon information and belief that the respondent has improperly, illegally and erroneously assessed the petitioner for sales taxes and penalties in the sum of $3,122.53 for the period December 10, 1934 to December 31, 1935, and that said assessment is illegal, erroneous and improper in that during said period petitioner did not make sales of its products in the City of New York, and in that all sales during said period were consummated without the limits of the City of New York.

15. Upon information and belief that the levy and collection of a sales tax on the sales of the machines of the petitioner by the respondent is unconstitutional, in that its imposition and collection is prohibited by Article 1, Section 8 of the Constitution of the United States as being a [fol. 12] burden on interstate commerce and is further prohibited by the Constitution and laws of the State of New York.

16. That no other or previous application for this or a similar order of certiorari has been made to any court or judge, and that no other or previous application for certiorari herein has been made, except that on or about the second day of March, 1937, an application for certiorari was made to the respondent pursuant to Article 7 of Local Law #20 of 1934, as amended, which application has not been acted upon by the respondent.

Wherefore petitioner prays that an order of certiorari be granted herein directed to Frank J. Taylor, Comptroller of the City of New York, commanding him to return to this court his said rulings, regulations and assessment in the premises together with his proceedings, decisions and actions in the premises with the dates thereof respectively and all and singular the correspondence, evidence, documents, records, exhibits and papers before him touching and concerning the taxation of sales by petitioner as

herein above more specifically set forth and whether said sales were made within the City of New York and are taxable under the Statute and said Local Law #20 of 1934, as amended, to the end that his decision and action may be reviewed and corrected on the merits by this Court and any error committed in said rulings, regulations and assessments may be corrected according to law and that said rulings, regulations and assessments may be reviewed and [fols. 13-14] corrected and the respondent or his successor and successors in office be directed to refund to the petitioner the tax paid involuntarily and under protest and duress as aforesaid and that petitioner may have such other, further and general relief as to the court may seem just and proper together with the cost and disbursements of this proceeding.

Dated, Chicago, Illinois, March 8, 1937.

Felt & Tarrant Mfg. Co., by G. J. Coupe, Secretary, Petitioner. Newton K. Fox, Attorney for Petitioner, Office and P. O. Address, 42 Broadway, Borough of Manhattan, City of New York.

Duly sworn to by G. J. Coupe. Jurat omitted in printing.

[fol. 15] EXHIBIT "A," ANNEXED TO PETITION

Felt & Tarrant Mfg. Co.,

1735 North Paulina Street,

Chicago, U. S. A.

Comptometer. February 18, 1937.

City Collector, % Comptroller of the City of New York, Department of Finance, Emergency Revenue Division, 50 Lafayette St., New York, N. Y.

In re Felt & Tarrant Mfg. Co.

DEAR SIR:

Reference is made to the letter dated February 13, 1937, from the office of the Comptroller, Department of Finance, City of New York, Emergency Revenue Division, determining a New York City sales tax and penalties allegedly due

from the above Company pursuant to Local Law #20 of 1934, as amended, for the period from December 10, 1934 to December 31, 1935, in the sum of $3,122.53.

The above Company takes exception to the findings in said letter of any liability for sales taxes due or payable to the City of New York by said Company on the grounds that the sales of its products are consummated in Chicago, Illinois, the goods are appropriated to the order in Chicago, Illinois, and are thereafter shipped in interstate commerce. Therefore the levy of a sales tax against said Company by the City of New York is unconstitutional, is a burden on goods shipped in interstate commerce and is prohibited by the Constitution of the United States and by Section [fol. 16] 1 of Chapter 873 of the Laws of the State of New York approved August 18, 1934, pursuant to the provisions of which the City of New York passed Local Law #20, as amended.

A check of the Company to the order of the City Collector in the sum of $3,122.53 is attached hereto in payment of the taxes and penalties as determined, but payment thereof is hereby made involuntarily and under protest and duress pursuant to the power vested in the Comptroller by Section 8 of Local Law #20 of 1934, as amended, to issue a warrant, in default of payment of the taxes and penalties as determined, directed to the Sheriff of any County in the City of New York, directing and commanding him to sell the real and personal property of the Company found within the County for payment of the amount of the taxes and any penalties and the cost of executing the warrant.

The above Company in making payment expressly reserves the right to contest by certiorari proceedings or otherwise its liability for the payment of any New York City sales taxes and penalties for the period in question and to contest the validity of any levy of or for said taxes and penalties pursuant to Local Law #20, as amended, and hereby expressly reserves the right to a refund of the amount of taxes and penalties paid by it.

Respectfully, Felt & Tarrant Mfg. Co., (Signed) R. J. Koch, Treasurer.

RJKoch:AG.

[fol. 17] EXHIBIT "B," ANNEXED TO PETITION

Felt & Tarrant Mfg. Co.,
1735 North Paulina Street,
Chicago, U. S. A.

Comptometer. March 2, 1937.

Honorable Frank J. Taylor, Comptroller of the City of New York, Department of Finance, Emergency Revenue Division, New York, N. Y.

In re Felt & Tarrant Mfg. Co.

SIR:

Pursuant to the provisions of Section 7 of Local Law #20 of 1934, as amended, application is hereby made for a review by certiorari of your final determination made on February 13, 1937, under Local Law #20 of 1934, as amended, of sales taxes and penalties due from the above Company for the period December 10, 1934 to December 31, 1935, in the sum of $3,122.53.

A hearing has been held, final determination has been made, the taxes and penalties have been paid involuntarily and under protest and duress and an application for an order of certiorari directed against you to review the said final determination will be made to the Supreme Court of the State of New York.

Please acknowledge the receipt of this letter.

Respectfully, Felt & Tarrant Mfg. Co., (Signed) G. J. Coupe, Secretary.

GJCoupe: AG.

[fol. 18] EXHIBIT "C," ANNEXED TO PETITION

Felt & Tarrant Mfg. Co.,
1735 North Paulina Street,
Chicago, U. S. A.

Comptometer. March 2, 1937.

City Collector, % Comptroller of the City of New York, Department of Finance, Emergency Revenue Division, New York, N. Y.

In re Felt & Tarrant Mfg. Co.

SIR:

After a final determination under Local Law #20 of 1934, as amended, by the Comptroller of the City of New

York of sales taxes and penalties in the sum of $3,122.53, for the period December 10, 1934 to December 31, 1935, the said taxes and penalties were paid on February 19, 1937, by the above company to your office involuntarily and under protest and duress.

Pursuant to the provisions of Section 10 of Local Law #20 of 1934, as amended, an application and claim for refund of said taxes and penalties is hereby made in the sum of $3,122.53 on the ground that the said taxes and penalties were erroneously and illegally assessed and collected.

An application for an order of certiorari directed against Frank J. Taylor, Comptroller of the City of New York, to review his final determination of said taxes and penalties will be made to the Supreme Court of the State of New York.

Please acknowledge receipt of this letter.

Respectfully, Felt & Tarrant Mfg. Co., (Signed) G. J. Coupe, Secretary.

GJCoupe:AG.

[fol. 19] IN SUPREME COURT OF NEW YORK, NEW YORK COUNTY

[Same title]

COMPTROLLER'S RETURN TO ORDER OF CERTIORARI

To the Supreme Court of the State of New York:

Frank J. Taylor, Comptroller of the City of New York, does hereby certify and make this return to an order of certiorari granted herein by Hon. Charles B. McLaughlin, a Justice of this Court, on the 10th day of March, 1937, consisting of all and singular his ruling and assessment in the premises with his proceedings, decisions, determinations and actions in the premises, and all and singular the evidence, documents, records and other papers before him or which were submitted to him relative to his determination of tax pursuant to New York City Local Law #20 of 1934, as amended, against Felt and Tarrant Mfg. Co.:

1. The return of receipts from sales and services pursuant to Local Law No. 20 of 1934, as amended, of Felt & Tarrant Mfg. Co., from December 10, 1934 to February 28, 1935.

2. The return to receipts from sales and services pursuant to Local Law No. 20 of 1934, as amended, of Felt & Tarrant Mfg. Co., from March 1, 1935 to May 31, 1935.

3. The return of receipts from sales and services pursuant to Local Law No. 20 of 1934, as amended, of Felt & Tarrant Mfg. Co., from June 1, 1935 to August 31, 1935.

4. Determination of the Comptroller of December 16, 1935, together with annexed exhibits determining tax defi- [fol. 20] ciency due from Felt & Tarrant Mfg. Co. under Local Law No. 20 of 1934, as amended, for the period from December 10, 1934 to August 31, 1935.

5. Letters, dated January 9 and 15, 1936, from Felt & Tarrant Mfg. Co. to City of New York, Department of Finance, requesting a hearing on said tax assessment.

6. Letter, dated January 22, 1936, from Milton Solomon, Deputy Comptroller, to Adrian C. Humphreys, attorney for Felt & Tarrant Mfg. Co. setting January 29, 1936 for hearing with respect to the determination of deficiency tax.

7. Minutes of testimony of hearing held April 29, 1936, at 2:30 P. M. in Room 836 at 50 Lafayette Street, Borough of Manhattan, City of New York, including the exhibits offered or received in evidence.

8. Determination of the Comptroller of the City of New York, dated June 24, 1936, determining tax deficiency due from Felt & Tarrant Mfg. Co. under Local Law No. 20 of 1934, as amended, for the period from December 10, 1934 to August 31, 1935, in the sum of $20,046.00.

9. Letter, dated July 7, 1936, from Felt & Tarrant Mfg. Co. to City of New York, Department of Finance, requesting a rehearing and an audit of the books at Chicago, Illinois.

10. Letter, dated July 20, 1936, from Milton Solomon, Deputy Comptroller, to Felt & Tarrant Mfg. Co. that an audit will be made.

11. Report after audit together with annexed exhibits determining additional tax due from Felt & Tarrant Mfg. Co. under Local Law No. 20 of 1934, as amended, for the [fol. 21] period from December 10, 1934 to December 31, 1935, as follows:

Principal	$3,218.01
Interest	535.22
Total	$3,753.23

12. Letter, dated November 20, 1936, from Felt & Tarrant Mfg. Co. to Milton Solomon, Deputy Comptroller, asking that a determination of sales tax liability be made and asking a credit of $630.70.

13. Determination of the Comptroller of the City of New York, dated February 13, 1937, reducing determination of deficiency tax due from Felt & Tarrant Mfg. Co. under Local Law No. 20 of 1934, as amended, for the period December 10, 1934 to December 31, 1935, to the sum of $3,122.53.

14. Letter from Felt & Tarrant Mfg. Co. to the Comptroller of the City of New York, dated February 18, 1937, transmitting check in the amount of $3,122.53, stating that the tax is paid under protest.

15. Letter from Felt & Tarrant Mfg. Co. to the Comptroller of the City of New York, dated March 2, 1937, stating that an application for an order of certiorari will be made.

16. Letter from Felt & Tarrant Mfg. Co. to the Comptroller of the City of New York, dated March 2, 1937, asking a refund of the taxes paid.

17. Letter from Milton Solomon, Deputy Comptroller, to Felt & Tarrant Mfg. Co., dated March 4, 1937, with reference to the request for a refund of the taxes paid.

[fol. 22] This return is based upon the records, proceedings and papers on file in the office of the Comptroller of the City of New York.

Respondent denies any knowledge or information sufficient to form a belief of any of the allegations set forth in paragraph 2 of the petition, except that respondent denies so much of paragraph 2 of the petition as alleges that petitioner is not doing business in the City and State of New York.

On information and belief, respondent denies each and every allegation set forth in paragraph 8 of the petition, except so much thereof as alleges that petitioner made sales of comptometers to persons in New York City during the period mentioned.

On information and belief, respondent denies each and every allegation set forth in paragraphs 9, 14 and 15 of the petition.

On information and belief, respondent denies so much of the allegations set forth in paragraphs 11 and 13 of the petition as allege that said taxes were paid under duress.

On information and belief, respondent denies all other allegations contained in the petition herein except as the same and to the extent that they may have been admitted by this return.

In Witness Whereof, the Comptroller of the City of New York has hereunto set his hand this 15th day of April, 1937.

Frank J. Taylor, Comptroller of the City of New York.

(Here follow three photolithographs, side folios 23-25)

Form 18 STX — 1 of Return — ORIGINAL

The City of New York
Department of Finance
BUREAU OF CITY COLLECTIONS

RETURN OF RECEIPTS FROM SALES AND SERVICES

FIELD AUDIT

(Pursuant to Local Law No. 20 of 1934 as amended)

Local Law No. 20 of 1934, as amended, imposes a tax to raise revenue for the purpose of relieving the people of the City of New York from the hardships and suffering caused by unemployment

Use form marked Duplicate For Work Sheet

PERIOD FROM December 10, 1934

TO February 28th, 1935

Enter Certificate No. here No. 1195

This space is for Departmental use only

PLEASE TYPE OR PRINT NAME AND ADDRESS ONLY — FOR PROPER ENTRIES

This return must be filed in one of the offices of the Bureau of City Collections indicated on the reverse side hereof within 20 days after the period covered by this return.

FOLT & TARRANT MFG CO
890 BROADWAY
NEW YORK N Y

B-1195

4 PCT

City No. 1786 Entered by

FEB. -26- 1935

Assigned by Ben Tucker

MAKE CHECKS PAYABLE TO CITY COLLECTOR

READ INSTRUCTIONS CAREFULLY BEFORE FILLING OUT RETURN
Answer All of the Following Questions

A. State kind and class of business Service of Comptometers
B. State whether taxpayer is a corporation, co-partnership, individual proprietorship, etc. Corporation
C. When was business begun? Prior to 1934 D. Was business discontinued during the period stated above? No
E. Has business name or address been changed during period stated above? No F. If so, give new name and address

G. Does this return cover business at more than one location? No If so, Form No. 1451 must be filed as part of this return.
H. The books of the taxpayer are in the care of H. L. Gilman, 299 Broadway, New York City, N. Y.
Name Address
I. If a method other than actual taxable sales is used in computing tax, state basis of computing taxable sales
J. State average monthly number of employees K. State average monthly salaries paid

Item No.	COMPUTATION OF TAX	For Taxpayer's use	For Departmental use only
1.	Receipts from sales (not included in Items 2 or 3)	$ 4,088.00	$ 411 29 3 37
2.	Receipts from installment sales upon which the tax is due	-	
3.	Receipts from sales of gas, electricity, refrigeration and steam and gas, electric, refrigeration, steam, telephone and telegraph service	-	
4.	Value of property purchased without tax used by you or in your business	-	1 112 17
5.	Total receipts (Items 1 to 4 inclusive)	$ 4,088.00	$ 412 401 54
6.	Less—Allowable deductions (Item 22, Page 2 of return)	-	1 000 -
7.	Receipts from taxable sales (Item 5 minus Item 6)	$ 4,088.00	$ 412 401 54
8.	Amount of tax (two [2%] percentum of Item 7)	$ 82.00	$ 8 28 11
9.	Total tax charged to customers on taxable sales	.00	
10.	Tax due the City of New York (Item 8 or Item 9, whichever is greater)	$ 82.00	$

DO NOT SEND CASH, CURRENCY OR STAMPS IN PAYMENT OF TAX
THE TAX PAYABLE TO THE CITY IS NOT LESS THAN 5% OF THE AMOUNT OF THE RECEIPTS FROM ALL TAXABLE SALES REGARDLESS SALES OF TWELVE CENTS OR LESS.

AFFIDAVIT

I swear (or affirm) that this return, including the accompanying schedules or statements, has been examined by me, and is, to the best of my knowledge and belief, a true and complete return, made in good faith, for the period stated, pursuant to Local Law No. 20, of 1934, as amended, and the regulations issued under authority thereof.

Sworn to and subscribed before me this 26th day of March 1935

Folt and Tarrant Manufacturing Co.
(Name of corporation, partnership, etc.)

Notary Public

My commission expires March 30, 1936

By [signature] Treasurer
Title

Form 12 STX. 1 of Returns ORIGINAL

RETURN OF RECEIPTS FROM SALES AND SERVICES

(Pursuant to Local Law No. 28, of 1934 as amended)

Local Law No. 28 of 1934, as amended, imposes a tax to raise revenue for the purpose of relieving the people of the City of New York from the hardships and suffering caused by unemployment

The City of New York

Department of Finance

BUREAU OF CITY COLLECTIONS

Use form marked Duplicate For Work Sheet

Enter Certificate No. here No.

PERIOD FROM December 30, 1934 to March 1-1935

TO February 28, to May 31st 1935

This return must be filed in one of the offices of the Bureau of City Collections indicated on the reverse side hereof within 20 days after the period covered by this return.

FELT & TARRANT MFG CO B-1175
299 BROADWAY
NEW YORK N Y 4 PCT

MAY 31 1935

This space is for Department use only Code No. 1705 Examined by

MAKE CHECKS PAYABLE TO CITY COLLECTOR

READ INSTRUCTIONS CAREFULLY BEFORE FILLING OUT RETURN

Answer All of the Following Questions

A. State kind and class of business Service of Complaints (Office Stationery)

B. State whether taxpayer is a corporation, co-partnership, individual proprietorship, etc Corporation

C. When was business begun? Prior to 1934. Was business discontinued during the period stated above? No.

E. Has business name or address been changed during period stated above? No. F. If so, give new name and address

G. Does this return cover business at more than one location? No. If so, Form No. 145L must be filed as part of this return.

H. The books of the taxpayer are in the care of H. L. Gilman, 299 Broadway, New York City, N. Y.
Name Address

I. If method other than actual taxable sales is used, state basis of computation J. Average monthly rental

K. State average monthly number of employees L. State total average monthly salaries paid

COMPUTATION OF TAX

Item No.		For Taxpayer's use	For Department use only
1.	Receipts from sales (not included in Items 2 or 3)	$ 5,797.80	$ 53,658.76
2.	Receipts from installment sales upon which the tax is due		
3.	Receipts from sales of gas, electricity, refrigeration and steam and gas, electric, refrigeration, steam, telephone and telegraph service		2-15
4.	Value of property purchased without tax used by you or in your business		1170 -
5.	Total receipts (Items 1 to 4 inclusive)	$ 5,797.80	$ 54,826.76
6.	Less—Allowable deductions (Item 21, Page 2 of return)		11 778 -
7.	Receipts from taxable sales (Item 5 minus Item 6)	$ 5,797.80	$ 43,048.76
8.	Amount of tax (two [2%] percentum of Item 7)	75.96	861 97
9.	Total tax charged to customers on taxable sales (including Item 4)	81.02	
10.	Tax due the City of New York (Item 8 or Item 9, whichever is greater)	$ 75.96	$

AFFIDAVIT

I swear (or affirm) that this return, including the accompanying schedules or statements, has been examined by me, and is, to the best of my knowledge and belief, a true and complete return, made in good faith, for the period stated, pursuant to Local Law No. 28 of 1934, as amended, and the regulations issued thereunder thereto.

Felt & Tarrant Mfg. Co.
(Name of Business or Taxpayer)

(Signature of Taxpayer or Officer or other authorized person, as the case may be)

TREASURER
Title

Sworn to and subscribed before me this 6th day of June 1935

(Signature of officer administering oath)

My commission expires 3-30-1937

Do Not Mail Coin, Currency or Stamps in Payment of Tax
The Tax Payable to the City is not Less than 2% of the Amount of the Receipts from all Taxable Sales including Sales of Trifling Costs or Less.

Cashier's Stamp

Form 12 STX — Page 1 of Return — ORIGINAL

The City of New York

Department of Finance

CITY COLLECTOR

RETURN OF RECEIPTS FROM SALES AND SERVICES

(Pursuant to Local Law No. 20 of 1934, as amended)

Local Law No. 20 of 1934, as amended, imposes a tax to raise revenue for the purpose of relieving the people of the City of New York from the hardships and suffering caused by unemployment

Use form marked Duplicate For Work Sheet

PERIOD FROM: June 1, 1934

TO: August 31, 1935

Enter Certificate No. here

This return must be filed in one of the offices of the Bureau of City Collections indicated on the reverse side hereof within 10 days after the period covered by this return.

FELT & TARRANT MFG CO
899 BROADWAY
NEW YORK N Y

B-1[illegible]

4 PCT

3

This space is for Department use only

MAKE CHECKS PAYABLE TO CITY COLLECTOR

READ INSTRUCTIONS CAREFULLY BEFORE FILLING OUT RETURN

Answer All of the Following Questions

A. State kind and class of business: Service of Comptometers

B. State whether taxpayer is a corporation, co-partnership, individual proprietorship, etc.: Corporation

C. When was business begun? Prior to 1930. Was business discontinued during the period stated above? No

E. Has business name or address been changed during period stated above? No F. If so, give new name and address

G. Does this return cover business at more than one location? No If so, Form No. 145L must be filed as part of this return.

H. The books of the taxpayer are in the care of H. L. Gilman, 899 Broadway, New York City, N. Y.
Name Address

I. If method other than actual taxable sales is used, state basis of computation J. Average monthly receipts

K. State average monthly number of employees L. State total average monthly salaries paid

COMPUTATION OF TAX

Item No.		For Taxpayer's use	For Department use only
1.	Receipts from sales (not included in Items 2 or 3)	$ 273.58	$ 3450[illegible]
2.	Receipts from installment sales upon which the tax is due		
3.	Receipts from sales of gas, electricity, refrigeration and steam, and gas, electric, refrigeration, steam, telephone and telegraph service		
4.	Value of property purchased without tax used by you or in your business		[illegible]10
5.	Total receipts (Items 1 to 4 inclusive)	$ 273.58	$ 3[illegible]17[illegible]
6.	Less—Allowable deductions (Item 21, Page 2 of return)		[illegible]677[illegible]
7.	Receipts from taxable sales (Item 5 minus Item 6)	$ 273.58	$ [illegible]6[illegible]
8.	Amount of tax (two [2%] percentum of Item 7)	17.48	[illegible]33
9.	Total tax charged to customers on taxable sales (including two percent of Item 4)	17.48	
10.	Tax due the City of New York (Item 8 or Item 9, whichever is greater)	$ 17.48	$ [illegible]8.35

AFFIDAVIT

I swear (or affirm) that this return, including the accompanying schedules or statements, has been examined by me, and is, to the best of my knowledge and belief, a verified complete return, made in good faith, for the period stated, pursuant to Local Law No. 20 of 1934, as amended, and the regulations issued thereunder.

Felt & Tarrant Mfg. Co.
Name of Business or Taxpayer

Taxpayer

Sworn to and subscribed before me this 18th day of September 1935

Notary Public

My commission expires 3-30-37

Do Not Mail Coin, Currency or Check in Payment of Tax. The Tax Payable to the City is one-half of One Per Cent of the Amount of the Receipts from all Taxable Sales including Sales of Tangible Goods, or Less.

Cashier's Stamp

This is [illegible] report for Felt & Tarrant Mfg. Co., covering [illegible] this is the complete [illegible] report [illegible]

[fol. 26] DOCUMENT No. 4, ANNEXED TO RESPONDENT'S RETURN

(Determination of the Comptroller of December 16, 1935, With Annexed Exhibits)

Form R-81. 23K-1.

Frank J. Taylor, Comptroller.
Milton Solomon, Deputy Comptroller.

Bureau of City Collections.
William Reid, City Collector.

The City of New York,

Department of Finance, Emergency Relief Taxes,

50 Lafayette Street, New York City

Dec. 16, 1935.

Name: Felt & Tarrant Mfg. Co.
Address: 299 Broadway, N. Y. C.
Registration Number M-1195.

Tax Deficiency Period Ended	Principal	Interest	Total
2/28/35	5400.00	702.00	6102.00
5/31/35	6000.00	600.00	6600.00
8/31/35	6800.00	544.00	7344.00
Total	$18200.00	$1846.00	$20046.00

Felt & Tarrant Mfg. Co., 299 Broadway, New York City.

DEAR SIRS:

The Comptroller hereby gives notice that based upon the exhibits and schedules herewith attached he has determined [fol. 27] that there is due and payable to the City of New York a deficiency of $20,046.00 in the amount of the tax (including interest and/or penalties) for the period from Dec. 10, 1934 to Aug. 31, 1935, pursuant to Local Law No. 20 of 1934, as amended.

Notice is hereby given that this determination shall finally and irrevocably fix the amount of tax due unless application in writing is made by you for a hearing thereon within thirty days after date of this letter.

Section 15 of Local Law No. 20 of 1934, as amended, provides in part as follows:

"Any person failing to file a return or to pay over any tax to the Comptroller within the time required by this Local Law shall be subject to a penalty of five per centum of the amount of tax due, plus one per centum of such tax for each month of delay or fraction thereof excepting the first month after such return was required to be filed or such tax became due * * *."

In the event of your failure to make application for a hearing within the time specified or to remit the tax assessed, the penalties as provided for in Section 15 hereinabove will become operative.

If you agree with the determination of your tax liability as stated above please remit the amount due together with this notice or a copy thereof, within thirty days after the date hereof.

Yours very truly, Milton Solomon, Deputy Comptroller.

[fol. 28] EXHIBIT A

Registration No. M-1195

Name: Felt & Tarrant Mfg. Co.
Address: 299 Broadway, N. Y. C.

12/10/34—2/28/35. Irving M. Haspel, Acct.

Summary Statement of Taxable Sales and Adjustments

Item No. as per Return	Particulars	As per Return	Return as Adjusted	Increase or Decrease	See Sched. Att'd.
1	Receipts from sales (not included in Items 2 or 3)...	4032.00	274032.00	270000.00	A1
2	Receipts from installment sales upon which the tax is due.....	.....	.....	.....	
3	Receipts from sales of gas, electricity, refrigeration and steam and gas, electric, refrigeration, steam, telephone and telegraph service.....	.....	.....	.....	
4	Value of property purchased without tax used by you or in your business.....	.....	.....	.....	
5	Total receipts (Items 1 to 4 inclusive).....	4032.00	274032.00	270000.00	

EXHIBIT A—Registration No. M-1195—Continued

Item No. as per Return	Particulars	As per Return	Return as Adjusted	Increase or Decrease	See Sched. Att'd
6	Less—Allowable deductions (See Item 21).....	—0—	—0—	—0—	
7	Receipts from taxable sales (Item 5 minus Item 6)...	4032.00	274032.00	270000.00	
8	Amount of tax (two (2%) percentum of Item 7)....	80.64	5480.64	5400.00	
9	Total tax charged to customers on taxable sales (including Item 4).....	.46	.46	—0—	
10	Tax due the City of New York (Item 8 or Item 9, whichever is greater).....	80.64	5480.64	5400.00	
	Penalties and interest 13%..	—0—	702.00	702.00	
	Total Tax, Penalties and Interest.....	80.64	6182.64	6102.00	

[fol. 29]

Schedule A-1
M-1195

Irving M. Haspel, Acct.

Felt & Tarrant Mfg. Co.,

299 Broadway, New York City

12/10/34—2/28/35

Item #1 of Return

Receipts from sales:

Amount as reported	$4032.00
Add: Additional receipts during taxable period, not reported (Note)	270000.00
Amount as adjusted	$274032.00

NOTE.—This amount represents additional receipts from taxable sales, not reported, as determined pursuant to Section 7 of Local Law #20 of 1935, as amended.

[fol. 30]

EXHIBIT B

Registration No. M-1195

Name: Felt & Tarrant Mfg. Co.
Address: 299 Broadway, N. Y. C.

3/1/35—5/31/35 Irving M. Haspel, Acct.

Summary Statement of Taxable Sales and Adjustments

Item No. as per Return	Particulars	As per Return	Return as Adjusted	Increase or Decrease	See Sched. Att'd
1	Receipts from sales (not included in Items 2 or 3)...	3797.30	303797.30	300000.00	B1
2	Receipts from installment sales upon which the tax is due.....	.....	.....	.....	
3	Receipts from sales of gas, electricity, refrigeration and steam and gas, electric, refrigeration, steam, telephone and telegraph service.....	.....	.....	.....	
4	Value of property purchased without tax used by you or in your business.....	.....	.....	.....	
5	Total receipts (Items 1 to 4 inclusive).....	3797.30	303797.30	300000.00	
6	Less—Allowable deductions (See Item 21).....	—0—	—0—	—0—	
7	Receipts from taxable sales (Item 5 minus Item 6)...	3797.30	303797.30	300000.00	
8	Amount of tax (two (2%) percentum of Item 7)....	75.95	6075.95	6000.00	
9	Total tax charged to customers on taxable sales (including Item 4).....	51.82	51.82	—0—	
10	Tax due the City of New York (Item 8 or Item 9, whichever is greater).....	75.95	6075.95	6000.00	
	Penalties and Interest 10%.	—0—	600.00	600.00	
	Total Tax, Penalties and Interest.....	75.95	6675.95	6600.00	

[fol. 31]

Schedule B-1
M-1195

Irving M. Haspel, Acct.

Felt & Tarrant Mfg. Co.,

299 Broadway, New York City

3/1/35—5/31/35

Item #1 of Return

Receipts from sales:

Amount as reported	$3797.30
Add: Additional receipts during taxable period, not reported (Note)	300000.00
Amount as adjusted	$303797.30

NOTE.—This amount represents additional receipts from taxable sales, not reported, as determined pursuant to Section 7 of Local Law #20 of 1935, as amended.

[fol. 32]

EXHIBIT G

Registration No. M-1195

Name: Felt & Tarrant Mfg. Co.
Address: 299 Broadway, N. Y. C.

6/1/35—8/31/35 Irving M. Haspel, Acct.

Summary Statement of Taxable Sales and Adjustments

Item No. as per Return	Particulars	As per Return	Return as Adjusted	Increase or Decrease	See Sched. Att'd
1	Receipts from sales (not included in Items 2 or 3)...	$ —0—	340000 00	340000 00	C-1
2	Receipts from installment sales upon which the tax is due.....	.....	.....	.....	
3	Receipts from sales of gas, electricity, refrigeration and steam and gas, electric, refrigeration, steam, telephone and telegraph service.....	.....	.....	.....	

EXHIBIT G—Registration No. M-1195—Continued

Item No. as per Return	Particulars	As per Return	Return as Adjusted	Increase or Decrease	See Sched. Att'd.
4	Value of property purchased without tax used by you or in your business.....	.....	.....	.....	
5	Total receipts (Items 1 to 4 inclusive).....	—0—	340000.00	340000.00	
6	Less—Allowable deductions (See Item 21).....	—0—	—0—	—0—	
7	Receipts from taxable sales (Item 5 minus Item 6)...	—0—	340000.00	340000.00	
8	Amount of tax (two (2%) percentum of Item 7).....	—0—	6800.00	6800.00	
9	Total tax charged to customers on taxable sales (including Item 4).....	—0—	—0—	—0—	
10	Tax due the City of New York (Item 8 or Item 9, whichever is greater.....	—0—	6800.00	6800.00	
	Penalties and Interest 8%..	.....	544.00	544.00	
	Total Tax, Penalties and Interest.....	—0—	7344.00	7344.00	

[fol. 33]

Schedule C-1
M-1195

Irving M. Haspel, Acct.

Felt & Tarrant Mfg. Co.,

299 Broadway, New York City

6/1/35—8/31/35

Item #1 of Return

Receipts from sales:

Amount as reported	—0—
Add: Additional receipts during taxable period, not reported (Note)	$340000.00
Amount as adjusted	$340000.00

NOTE.—This amount represents additional receipts from taxable sales, not reported, as determined pursuant to Section 7 of Local Law #20 of 1935, as amended.

[fol. 34]

City Sales Tax

Date Dec. 2, 1935

Name: Felt & Tarrant Mfg. Co.
Address: 299 Broadway, N. Y. C.

Registration No. M-1195.

Accountant: Irving M. Haspel.

Recapitulation

Period Covered	Exh.	Add'l. Taxable Receipts	Add'l. Tax	Penalties and Interest	Total Tax as Adjusted	Tax Reported	Tax Paid	Tax Due
12/10/34 to 2/28/35	A	270000.00	5400.00	702.00	6182.64	80.64	80.64	6102.00
3/ 1/35 to 5/31/35	B	300000.00	6000.00	600.00	6675.95	75.95	75.95	6600.00
6/ 1/35 to 8/31/35	C	340000.00	6800.00	544.00	7344.00	—0—	—0—	7344.00
Total.....		$910000.00	$18200.00	$1846.00	$20202.59	$156.59	$156.59	$20046.00

[fol. 35] DOCUMENT No. 5, ANNEXED TO RESPONDENT'S RETURN

(Letter, Dated January 9, 1936, Requesting a Hearing)

Felt & Tarrant Mfg. Co.,
1735 North Paulina Street,
Chicago, U. S. A.

Comptometer. January 9, 1936.

City of New York, Department of Finance, 50 Lafayette Street, New York City, N. Y.

Your reference M-1195

GENTLEMEN:

Attention Mr. Milton Solomon, Deputy Comptroller

We take exception to your determination of tax liability as shown on your tax determination notice dated December 16th, showing an assessment against this corporation of $20,046.00.

We request that you set a date for a hearing in this case and advise us of same.

Very truly yours, Felt & Tarrant Mfg. Co., G. J. Coupe, Secretary.

GJCoupe:AG.

[fol. 36] DOCUMENT No. 6, ANNEXED TO RESPONDENT'S RETURN

(Letter, Dated January 15, 1936, Requesting a Hearing)

Law Offices of Adrian C. Humphreys, 42 Broadway, New York

Adrian C. Humphreys.
Newton K. Fox.

Telephone: Digby 4-2190.

January 15, 1936.

City of New York, Department of Finance, 50 Lafayette St., New York City.

Attention Milton Solomon, Deputy Comptroller

GENTLEMEN:

Protest is made to your determination of December 16, 1935 of a deficiency of $20,046.00 in tax for the period of December 10, 1934 to August 31, 1935 under Local Law #20 of 1934, as amended.

It is respectfully requested that you grant a hearing on this determination at an early date, advising the undersigned at 42 Broadway, Borough of Manhattan, New York City, the date of such hearing.

Yours very truly, Felt & Tarrant Manufacturing Co., Adrian C. Humphreys, Attorney.

[fol. 37] DOCUMENT No. 7, ANNEXED TO RESPONDENT'S RETURN

(Letter, Dated January 22, 1936, Setting Hearing)

The City of New York

Department of Finance, Bureau of City Collections,
Emergency Tax Division,

50 Lafayette Street, New York, N. Y.

City Sales Tax.

Date Jan. 22, 1936.
Refer to File No. M-1195.

Name: Felt & Tarrant Mfg. Co.
Address: 1735 North Paulina Street, Chicago, Ill.,
City: ——. County: ——.

DEAR SIR:

In answer to your letter of Jan. 9, 1936 please be advised that a hearing will be held in Room 836 at 50 Lafayette Street, Borough of Manhattan, on Jan. 29, 1936 at 3:00 P. M., with respect to the determination of the deficiency tax assessed pursuant to the provisions of Local Law No. 20 of 1934, as amended.

You are accordingly advised to appear at the time and place hereinabove designated. A power of attorney is required in all cases where the taxpayer is represented by another person acting in his behalf.

Very truly yours, Milton Solomon, Deputy Comptroller.

[fol. 38] DOCUMENT No. 8, ANNEXED TO RESPONDENT'S RETURN

(Minutes of Testimony Taken at Hearing Held on April 29, 1936, at 50 Lafayette Street, New York, N. Y.)

Hearing

Felt & Tarrant Mfg. Co.

April 29, 1936.

Hearing Stenographer: Evelyn Savin.
Book 1, Pages 130-200; Book 2, Pages 1-34.

Testimony at Hearing Held April 29, 1936 at 2:30 P. M. in Room 836 at 50 Lafayette Street, New York, N. Y.

Mr. Louis Goodgold, Felt & Tarrant Mfg. Co., 299 Broadway, New York City.

Appearances:

Adrian C. Humphreys, Esq., Newton K. Fox, Esq., Attorneys for taxpayer, 42 Broadway, N. Y. C.
John C. Nevins, Vice-President.
H. L. Gilman, Division Manager.

Mr. Goodgold: This is a hearing pursuant to determination made by the Comptroller under Local Law #20 of 1934, [fol. 39] as amended, for the period of December 10, 1934, thru August 31, 1935.

Mr. Fox: My preliminary statement: This matter is before the Board on a determination of sales tax liability, and notice to the Felt & Tarrant Mfg. Co. of Chicago, Ill. The company upon receipt of the notice of proposed taxes duly filed a protest and requested a hearing. Hearings have been held on several occasions before Mr. O'Leary. Certain exhibits consisting of the sub-solicitors agreement, order blank of the company, bill of lading, weigh bill, and shipping notice were filed, together with the affidavits of Mr. Gilman, principal solicitor in New York City and Mr. Raymond J. Koch, president of Felt & Tarrant Mfg. Co. In addition, a brief of the authorities showing the limitations upon a state or municipality of burdening inter-state commerce, by attempting to tax sales of goods shipped in inter-state commerce was filed.

The position of Felt & Tarrant Mfg. Co. is that it is a foreign corporation organized under the laws of the State of Illinois. That it manufactures its product in Illinois and ships its goods in inter-state commerce, upon orders which are solicited in New York City and other places, which orders are subject to the approval of an officer of the company at Chicago. That upon receipt of an order, the goods are selected and appropriated to that order and the number of the machines so appropriated is placed on the——

Mr. Goodgold: I want to interrupt you at this stage by ruling out your statement. You are setting forth facts which the witness——

[fol. 40] Mr. Fox: These are questions we expect to prove.

Mr. Goodgold: I think that if you state you will prove these facts——

Mr. Fox: Yes.

Mr. Goodgold: But if you are setting out to make a case on these facts——

Mr. Fox: That is all to be brought out by witnesses.

Mr. Goodgold: If you will qualify that, I will permit it.

Mr. Fox: The above facts are what we expect to show by our witnesses. We further expect to show by our witnesses. In addition to the above we expect to show that there are no machines in New York City for sale. That the solicitors cannot sell a machine or close a sale, and that there is no warehouse or other depository in New York City where machines are carried in stock.

Mr. Nevins will be the first witness.

The witness having first been duly sworn did testify as follows:

Mr. Fox: What is your connection with the Felt & Tarrant Co.?

Mr. Nevins: I am the vice-president of the company and my principal duties are that of general salesman.

Q. Where are the offices of the company located?

A. 1735 N. Paulina, Chicago.

Q. Does the company have a manufacturing plant in New York State?

A. No, sir.

[fol. 41] Q. Are you familiar with the sub-solicitor's agreements that are executed?

A. I am.

Q. Will you identify that?

Mr. Goodgold: I think we ought to have a statement in the record that there are such agreements, and how they come about and ask if the witness is familiar with them.

Mr. Fox:

Q. Can you identify that?
A. Yes, sir.
Q. What is it?
A. It is an agreement executed between Harvey L. Gilman, part of the first part and one of the sub-agents in New York Mr. Edward.

Mr. Fox: I offer in evidence sub-solicitors agreement just identified and request that a photostatic copy be substituted in place of the original. You can compare that photostatic copy attached there.

Mr. Goodgold: I have to rule this agreement out on the ground that it states the 1st day of February, 1936, and has no bearing on the question at issue before us now, since the tax imposed relates to the period from December 10, 1934 thru August 31, 1935.

Mr. Fox:

Q. How long has that form been in use?
A. About 9 years.
Q. Has there been any change in that form during 9 years?
A. No, sir.

[fol. 42] Mr. Goodgold: Have you forms used during the period under review?

Mr. Fox: Can you get hold of some. Telephone for some.

Mr. Goodgold: If you want to stipulate for the record that that is a form of contract but not the contract upon which the Comptroller has based his determination, I will let it go in for what it is worth, but not as evidence substantiating your claim that sales are in inter-state commerce.

Mr. Fox:

Q. I ask if you can identify that?
A. This is our standard form of order blank.
Q. How long has that been in use?
A. For more than 15 years. I couldn't go back farther that that.

Q. I think there is a photostat of that. No the original is in there. I offer in evidence the blank used by Felt & Tarrant Co. for as least the last 15 years.

Mr. Goodgold: I will mark it for identification.

Mr. Fox:

Q. Was this form of order blank the only one in use during the period of December 10, 1934 to August 31, 1935?

A. It was.

Q. I will again offer the order blank in evidence.

Mr. Goodgold: I understand that this is the only one or type of blank. Any other type?

[fol. 43] A. We have no other type of order blank. That is the standard form.

Q. Are these order blanks forwarded to the company in Chicago by sub-solicitors in New York?

A. Yes.

Q. In every case?

A. No, not in every case. It is true that in some cases the customer issues his own purchase order, but these are the order blanks that every sub-agent carries and in the large majority of cases the customer signs.

Q. There are other order blanks forwarded to you by the customer which you honor?

A. Yes, sir.

Q. I will mark that in evidence.

Mr. Fox:

Q. Will you state what is done in Chicago when such order blank is received?

A. The order goes first to the credit department where it is passed on.

Q. What do you mean passed on?

A. Where credit is passed on. If the customer's credit is good the order is passed from there to the billing department, where an order is made out on the shipping department for the shipment of a comptometer, and on that order it specifies and shows the customer's name to whom the shipment is to be delivered and the customer's individual order, if there be one. There is an individual order number. A shipping order is then delivered to the shipping department and shipment is made of the machine.

Q. Is it required that this order be approved by an officer of the company?

A. It couldn't be filled without approval.

[fol. 44] Mr. Goodgold: Is it required by whom?

Mr. Fox: It is required by the company.

Mr. Goodgold: In accordance with the order here?

Mr. Fox:

Q. It is printed on the bottom of it. How is that acceptance made on the order blank?

A. That acceptance is made by the delegation by our treasurer to the credit man for his approval at the time.

Q. That is before the order is filled or after?

A. No that is before.

Q. Would it be upon receipt or later?

A. On receipt, because that is the first step in the procedure.

Q. What means do you use in making deliveries of these orders? How are they forwarded to the customer?

A. Well by common carrier. Sometimes by express, occasionally by freight, whether the shipment be a large one, or by regular motor service.

Q. Are there any limitations on the authority of the principal solicitor or sub-solicitor in relation to soliciting orders?

A. No, sir.

Q. What are the limitations on them?

A. At the time of the employ, when the original contract is signed and all subsequent contracts, that contract specifies that the only authority that the sub-solicitor has or the general solicitor, is to solicit orders for the machines. With the understanding that they are not definite orders until they have been approved and accepted in Chicago.

[fol. 45] Q. Do you have any warehouse or other depository in the City of New York or State of New York?

A. No, sir.

Q. Is there any stock of machines carried in New York City from which sales could be made?

A. No, sir.

Q. That was true during all the period covered in this investigation?

A. Yes, sir.

Q. I would like to state for the purpose of the record that all of my questions although not qualified as relating to the

period December 10, 1934 to August 1, 1935, are directed to the period in question of those taxes.

Q. Can you identify that paper?

A. I can.

Q. What is it?

A. That is an order made out by the billing department upon our shipping department for the shipment of a machine for which they have already received and approved an order.

Q. Where is that done?

A. At Chicago, Ill.

Q. Is that what you mean in our billing department?

A. Yes.

Q. What would you call it?

A. It is an order.

Q. I offer in evidence a typical shipping order and request that a photostatic copy be substituted for the original.

Mr. Goodgold: I'll have to rule it out on the ground it doesn't cover the period under review.

Mr. Fox:

Q. How long has this form been in use?

A. Many years.

[fol. 46] Mr. Goodgold: If you want to introduce that merely as to the form of order blank used by the company, I have no objection to marking it for identification, but it has no value as evidence.

Mr. Fox: I appreciate the period is not covered.

Q. How long has this been in use?

A. For many, many years.

Q. And it is a typical form used during the period in question?

A. Yes.

Q. In the upper right hand corner you see some figures. Will you explain the process—of when this is made up and when the figure is put on, and what that figure relates to?

A. The order blank?

Mr. Goodgold: Just a minute. At this stage of the proceeding, I also rule that that would not be admissible since it relates to a transaction not covered during the period under review.

Mr. Fox:

Q. Well then, will you state what was done during the period under review with reference to the blanks in use at that time?

A. The blank was made out showing the destination of shipment, customer's name, — whom the machine was to be delivered, and the blank then was sent to our shipping department. As soon as the machine was packed, that was allocated to this order, the man in charge of the shipping department puts down in the upper right-hand corner the [fol. 47] serial number of the individual machine assigned. Do you want me to go on?

Q. Yes, proceed.

A. The next step, is this shipping order is turned to the billing department, where a bill is made out for the specific machine. That is then shipped for the customer.

Q. And that is all done where?

A. At our general offices in Chicago.

Q. How are customers billed?

A. The ordinary kind of procedure. The billing department makes out a bill to the customer showing the serial number of the machine shipped, and that bill, together with a letter, is sent to the customer by mailing direct.

Q. From where?

A. From Chicago.

Q. Where are remittances received?

A. In Chicago only. We make all collections right from there.

Q. Are any billings made in New York City, or were any billings made in the City during the period in question?

A. No, sir.

Q. Any collections during the period in question?

A. No, sir.

Q. When your number is placed on the billing sheet, is there any notification sent to your principal solicitor?

A. Yes, sir.

Q. What do you advise him?

A. We advise him by means of a duplicate of the shipping order.

Q. And does that have the number of the machine on it?

A. Yes, sir. That is made out in duplicate by the shipping department.

Q. I would like to file one of these during the period in question certified to by——

[fol. 48] Mr. Goodgold: You mean a blank shipping order form.

Mr. Fox: Yes a typical order form during the taxable period.

Mr. Goodgold: All right, you may file it.

Mr. Fox: And file that in evidence, and a typical invoice too.

Mr. Goodgold: All right.

Mr. Nevins: There is a possibility that we might have some duplicate.

Mr. Fox: I would rather get the typical. You call it shipping order?

A. Shipping order in the factory.

Mr. Fox: I don't know of anything else to examine the witness on.

Mr. Goodgold: You are through with him? Mr. Nevins you are vice-president of Felt & Tarrant Mfg. Co.?

A. Yes, sir.

Q. How long have you been vice-president?

A. Since about 1914.

Q. Since 1914. Were you vice-president during the period under review?

A. Yes, sir.

Q. Can you tell us nature of the duties?

A. My duties consist primarily of the supervision of sales offices. The determination of sales policies, the approval of hiring of sub-solicitors, and the hiring of solicitors. A good many other things.

Q. You are thoroughly familiar with the operation of the company?

A. Absolutely.

[fol. 49] Q. Do you know whether or not the company is licensed to do business in the State of New York.

A. The Felt & Tarrant Mfg. Co. is not licensed as far as I know.

Q. Who would know?

A. Well that would be a matter of record.

Q. Can you find out and let us know?

A. I could. We are doing an interstate business and don't license.

Q. State for the record the nature and character of your transactions. In other words, what do you manufacture and what do you sell?

A. We manufacture comptometer adding and calculating machines.

Q. Will you describe just what those things are?

A. They are machines——

Q. What are they used for?

A. They are used for the rapid, accurate, figuring of all business calculations in billing departments, cost departments, statistical department, general accounting.

Q. Do you mean both types of machines?

A. We only manufacture the one.

Q. You said comptometer and calculator.

A. The comptometer is referred to as one machine.

Q. It is one machine but does both, is used as a calculator and comptometer?

A. Yes.

Q. Are there different types?

A. There are different sizes and different types, in that one is electrically and one is manually operated. There are also variations in special machines for the adding of fractions like the silk business use ⅛'h and the leather business ¼th and the package goods where they use 1/12th of a dozen and other special machines.

[fol. 50] Q. You have an office in New York City?

A. Yes, sir.

Q. Where?

A. 299 Broadway.

Q. What kind of office?

A. Sales office.

Q. Do you carry any stock on hand in your sales office?

A. We have sample machines.

Q. Do you have any available for sale?

A. No, sir.

Q. Are those machines that you carry for samples in your New York office any different than those in the Chicago office?

A. No, they are no different.

Q. You do all manufacturing in Chicago?

A. Yes.

Q. Do you do repair work in Chicago?

A. Yes, sir.

Q. Do any manufacturing in New York City?

A. No, sir.

Q. Do any repair in New York City?

A. No, sir.

Q. What kind of staff do you maintain in New York City?

A. We have a general solicitor Mr. Gilman and sub-solicitors.

Q. Do you have any mechanics employed in the City?

A. No.

Q. Direct or indirectly?

A. No, sir, the service end of the business is handled by another company entirely.

Q. Is there a contractual relation between the other company and customers to whom you sell machines?

A. I am sorry I don't get the meaning.

Q. You guarantee the machines that you sell in the City of New York?

A. Yes.

Q. What is the nature of the guarantee?

A. That guarantee contemplates the keeping of the ma- [fol. 51] chine in complete and accurate repair for one year from date.

Q. On the part of Felt & Tarrant Co.?

A. Yes.

Q. And then you say that Felt & Tarrant does not do that service. So you engage another company?

A. Yes.

Q. That company you engage has no contractual relation with the customer other than to perform as directed by you?

A. We don't direct them.

Q. You don't direct them?

A. They just do the business themselves.

Q. You guarantee to keep the machines in good and proper order and condition and in order to comply with the terms of the contract you engage an outside company to do the work?

A. Yes.

Q. And upon orders received from your company, this other company, by the way what is the name?

A. Comptometer Company.

Q. The Comptometer Company performs services you guarantee to your customers?

A. Yes, that is so. We don't have much to do in the first year.

Q. The customers look to you. How long is the guarantee good?

A. One year.

Q. The customers look to you at all times for the fulfillment of your part of the contract and not to Comptometer Company?

A. Yes, I suppose that would be true.

Q. And do you furnish parts to these customers as the case requires through Comptometer Company?

A. We do. The Comptometer Company buys the parts and does the work.

Q. In your behalf?

A. Well, if the case should require repair, I presume they would, because that is one of the obligations they have taken [fol. 52] over in turn for the arrangement they have with us for handling the repairs.

Q. But I am trying to get on the record that there is no contractual relation between Comptometer Company and your customer during the first year covered by your guarantee. That during such time the Comptometer Company merely acts as your agent?

A. Well, that isn't quite true. I will tell you why. One of the standard services that the Comptometer Company offer is the monthly inspection, oiling, cleaning service.

Q. To whom?

A. To their customers.

Q. But I am talking about your customers. The people to whom you sell comptometers?

A. But they render monthly services right during the first year.

Q. Only as a result of the obligation assumed by your company?

A. No, that is for the purpose of getting the customer in the habit of using the service and see how good it is so that he will continue long after the first year.

Q. And I ask isn't there a contractual relationship between the Comptometer Company and your customer?

Mr. Fox: I think it calls for a conclusion of law.

Mr. Goodgold: No, a question of fact. Is there any contract or agreement between the Comptometer Company and your customers that they will keep in good order the machines which the Felt & Tarrant Mfg. Co. sells to its customers, or is it a condition of the contract of sale that such company, the Comptometer Company will perform

[fol. 53] services required of you and under your contract for the first year. Surely that is not asking for a conclusion of law.

A. I don't know how to answer. I don't know. We don't have one repair that has to be made out of a thousand. They just don't get out of order. The case doesn't come up.

Q. Is there a contract between you and the Comptometer Company calling for their services to your machines sold to your customers?

A. There is a license issued as a result of the Board of Directors authorizing the Comptometer Company to handle the service.

Q. Is there no written agreement between Felt & Tarrant Mfg. Co. and the Comptometer Company?

A. To that extent.

Q. Have you a written agreement?

A. No.

Q. Can you give us a copy?

A. I guess we can.

Q. Will you please send it to us with the others. How do you make your sales in the City of New York? What is your method?

A. The sub-solicitors.

Q. Before you come to that, you have an arrangement with what you call a solicitor who in turn has sub-solicitors for the purpose of promoting your sales in the City of New York. Isn't there a written agreement between the solicitor and the Felt & Tarrant Mfg. Co. relating to such operations in the City of New York?

A. I don't know how to answer that.

Q. I want to know if a written agreement between the parties, between the solicitor and Felt & Tarrant Co. have the terms and conditions of employment between the parties? [fol. 54] A. No. I would have to answer no and yet that answer is not entirely correct.

Mr. Fox: Explain that.

Mr. Goodgold: Let me call your attention to the fact that there is an agreement dated February first, 1936, between the solicitor and Felt & Tarrant Mfg. Co. and I ask whether there is a similar agreement prior to that date.

A. You refer to a sub-solicitor's agreement with Mr. Gilman.

Q. Is there an agreement between the solicitor and the company, a written agreement?

A. No.

Q. Will you state for the record what those agreement terms were between the solicitor Mr. Gilman and your company? What were the terms of the agreement?

A. Of compensation?

Q. As they existed?

A. They consist of salary and agreed bonus on all sales over 500 a year, I believe.

Q. $500.00 a year?

A. No. 500 machines.

Q. Is Mr. Gilman, the solicitor, an employee of the company or is he an independent contractor?

A. I don't know how to answer. He is directly in our employ, yes.

Q. Is he on the payroll as an employee?

A. Yes, sir.

Q. Are the men he employs as sub-solicitors under your jurisdiction or under his jurisdiction?

A. They are directly under his jurisdiction.

Q. Does he pay them their salary, or is the company obligated to pay them?

A. We advance their salaries, it is true.

[fol. 55] Q. Would you say the sub-solicitors are employees of the company?

A. Well that is kind of hard to answer. Because, after all we supervise them in a general way. In a general way we might say we had jurisdiction, yet actually they are under his direction.

Q. They may be under his direction, but are they considered employees of the company or Mr. Gilman?

A. I would believe that they were employees of the company.

Q. Do you regard them as such on your payroll?

A. Yes.

Q. They are paid with the funds of the company, not with funds of Mr. Gilman?

A. That is right.

Q. Checks made out by the company to these sub-solicitors?

A. Yes.

Q. Who determines salaries?

A. Mr. Gilman.

Q. And has he power to bind the company in that respect?

A. Well we usually talk that over before changes are made, but at the same time if Mr. Gilman did so, it would have our backing.

Q. You introduced a form of order marked Taxpayer's Exhibit I. This is an order furnished by Felt & Tarrant Mfg. Co., isn't it?

A. Yes.

Q. The customer in many cases sends you his own form of order?

A. Yes, sir.

Q. And that form of order may be entirely different from what is indicated on your form?

A. It can't be very different because we won't accept an order unless it is addressed to Felt & Tarrant, Chicago.

Q. That is not my question. My question is that the letter or print on an order may be different?

A. Yes.

[fol. 56] Q. They may merely call for delivery of a certain amount of comptometers at certain prices and may be shipped on the order calling for delivery from your home office?

A. Yes, except the fact that those orders have to be addressed to Felt & Tarrant, Chicago, Illinois. It won't be accepted unless they are.

Q. In many cases they are sent to the New York office. What happens then?

A. If the order comes addressed to Felt & Tarrant Mfg. Co., 299 Broadway, it is sent back to the customer with instructions to change it to Felt & Tarrant Mfg. Co., Chicago.

Q. Ever change it yourself and send it to Chicago?

A. No, sir.

Q. What is the method of soliciting business from your customers in New York?

A. I should say the common way. Take a sample of the machine out, demonstrate it.

Q. You mean customers call at your place of business in the City of New York?

A. I say we take a sample out, they are small machines, and we carry it in carrying cases, and the sub-solicitors take it out, call on new prospects, demonstrate the machine.

Q. As a matter of fact, before you actually receive an order or contract of sale, isn't it a practice of your company

to install these machines in offices of the customer for his approval before a contract is acted upon by the customer?

A. That is sometimes done. What you mean is if when we demonstrate, he gets interested and says I would like to know whether that actually will do my work, and we say we'll leave you a trial machine and you can use it.

[fol. 57] Q. As a matter of fact the machine you leave is the machine you sell in many cases?

A. No, sir, never.

Q. Isn't that a common practice amongst people engaged in your line of business?

A. I don't know what other people do.

Q. They leave a machine in the office of customers for a considerable time and the customer decides to take it?

A. That machine is not sold. We have had occasion where a customer asked for the machine and he is told that is a sample machine and cannot be sold.

Q. The only reason the order must be sent to the home office, as I understand it, is to pass upon credit rating of the customer.

A. No, sir. That is not the only reason. There are other reasons. Sometimes a customer will make a mistake on price that he specifies on the order.

Q. Don't your salesmen quote him prices?

A. Yes.

Q. Don't they show him the type machine he is going to get?

A. Yes, sir.

Q. And then the only thing is whether his credit is good.

A. You will be surprised to see how many times they will get prices of different sizes wrong.

Q. You have a catalogue?

A. Yes.

Q. They use that?

A. I suppose they use it some times.

Q. Assuming there is no error on the part of the customer because of size, etc., assuming that he knows the type machine he wants, by reason of the fact that he has examined the sample, and he knows what it is going to cost, the only remaining thing is the passing upon credit by the home [fol. 58] office?

A. No, sir. There is another common reason. If the customer sends in an order, he is likely to have a clause saying it is subject to 2% discount for cash and we give no such

discount, and if that order comes in that way, it is returned to him.

Q. The solicitor in the City of New York has no power whatever to accept an order?

A. None whatever.

Q. His duties are merely to procure orders, as I understand?

A. To procure orders and send it in.

Q. And the order is accepted in the home office by whom?

A. By the treasurer.

Q. And then the goods are shipped and forwarded to the customer in the City of New York. How are they packed for shipment?

A. Well, regular shipping cartons.

Q. Do you pack individually or pack in large cases?

A. No, packed individually. They have to for protection.

Q. In what kind of container?

A. Well, it's a very heavy pasteboard carton, just big enough to contain the machine.

Q. Are all assembled parts of that machine inclosed in that carton?

A. Yes, it is the complete machine.

Q. And then they are then forwarded to the office of the solicitor, is that right?

A. Unless the customer specifies otherwise.

Q. As a general rule they are forwarded, they are shipped to the general solicitor here.

Q. Then the office of the solicitor opens the cartons to see whether they are fit for use?

A. They are tested before delivery. We have a great deal of breakage.

[fol. 59] Q. Then the solicitor performs other duties than procuring orders in the City of New York. He opens the cartons, he examines them, and if something is wrong, he causes them to be repaired, either by his salesmen or by others under his direction.

A. Yes.

Q. So that in addition to procuring orders these salesmen or solicitors do perform other services in the City of New York?

A. To that extent.

Q. How long do the machines remain in possession of the solicitor after receipt here?

Mr. Fox: I think we could find out through Mr. Gilman the questions as to what is done in the New York office.

Mr. Nevins: He could answer much better. He has first hand knowledge.

Mr. Goodgold: All right.

Mr. Goodgold: Do you want to have him sworn in?

Mr. Fox: I want to ask one or two questions.

Q. You stated salaries are advanced by Felt & Tarrant to sub-solicitors?

A. Yes.

Q. If they are advanced are they credited later against commissions earned?

A. Those solicitors as shown here are on salary and commission. They are paid regular salary and commission.

Q. Let us assume that the New York Telephone Co. sends in an order on its own form, rather than using the typical order form introduced in evidence. Must that be approved in Chicago?

A. Yes, sir.

Q. Could it be approved by the New York office without being forwarded?

A. No, sir.

[fol. 60] Q. Could it be filled by the local office?

A. No.

Q. With reference to demonstrating machines, has there ever been a case where such machine having been left for demonstrating purposes, has later been sold to that customer in the City of New York?

A. Not without it having come to Chicago.

Q. In other words, if a sub-solicitor leaves a demonstrating machine with the New York Telephone Company is that ever sold to the company? That particular demonstrating machine?

A. No, not at any time. No.

Q. With reference to the services performed by the Comptometer Company, have tax returns been filed with the City of New York, and tax returns been paid?

A. Yes.

Q. On all services rendered by Comptometer Company on sales?

A. Yes.

Q. How are customers billed on repair jobs by the Comptometer Company?

A. They are billed by Comptometer Company of Chicago.

Mr. Goodgold: Of course services rendered by Comptometer Company having to do with services under the first year's agreement with the customer, in such cases they are not charged anything, as I understand it.

Mr. Fox:

Q. Is that correct? Under the year's guarantee no charge is made by Comptometer Company for services performed?
A. No.

[fol. 61] Mr. Goodgold:

Q. Do you ever ship any merchandise yourself from Illinois to any extent. I mean do you have your own delivery service from Illinois?
A. No by common carrier.
Q. No delivery yourself?
A. No.
Q. When a machine is delivered to a customer in New York do you ever have occasion to take back an old machine?
A. Yes.
Q. Done often?
A. Yes, sir.
Q. Those machines are kept where?
A. Those are returned right away from here to our Chicago office.
Q. Originally where are they sent? Are they returned to the New York office first?
A. I would say in most cases they were picked up.
Q. Do you keep those machines in the New York office for any considerable time?
A. No.
Q. How long?
A. I am afraid you have to ask Mr. Gilman. What we do is wait for a few to ship back at a low rate.
Q. Ever re-sell to anybody in the City of New York?
A. No, sir.
Q. What happens to these machines?
A. Break them up.
Q. Don't rebuild?
A. We rebuild one out of 75 or 100.

Mr. Goodgold: That is all the questions I have to ask.

Mr. Fox:

Q. Can you identify that paper?

A. I can. It is the sub-solicitor's agreement dated July [fol. 62] 15, 1934, to be in force for one year from that date between Harvey L. Gilman.

Mr. Goodgold:

Q. It would appear from that agreement that Mr. Gilman is an independent contractor. That he is not an employee of Felt & Tarrant Mfg. Co. Isn't that a fact that the relationship existing between the sub-solicitors and the company are solely indirect but they are direct with the solicitor himself?

A. Of course this agreement cannot be put into effect until it is approved by an officer of the company.

Mr. Goodgold:

Q. Is there anything in this agreement that provides for that?

Mr. Fox:

Q. Who approved that?

A. I signed and approved it.

Mr. Goodgold:

Q. Where is anything in the contract that says the terms must be approved?

A. Page 2 of the contract, paragraph 8, "That this contract though signed is subject to the approval of Felt & Tarrant and shall not be binding until the approval of said company is endorsed."

Q. Shall not be binding upon whom? Cannot be binding on the solicitor?

A. Can't be binding upon anybody.

Q. I mean it will only be binding when approved, on Mr. [fol. 63] Gilman as solicitor and not on Felt & Tarrant Mfg. Co.

A. No. It seems that in the sense, that paragraph means that it is not actually a contract or agreement until——

Q. But the only condition in the contract affecting the Felt & Tarrant Mfg. Co. is the one as stated that it must meet with the approval of Felt & Tarrant Mfg. Co. Noth-

ing in the contract is binding on the company in any way in the contract between the solicitor and sub-solicitor. No contractual relationship between Felt & Tarrant Mfg. Co. and sub-solicitors.

A. Except in accordance with the terms of the contract that those terms have to be carried out to the satisfaction of Felt & Tarrant.

Mr. Goodgold: I take it you want to introduce that in evidence.

Mr. Fox: Yes, I would like to introduce, I would like to have Mr. Gilman and Mr. Nevins read into the record clause 2.

Mr. Goodgold: The contract speaks for itself. You can have it.

Mr. Fox: I offer sub-solicitors agreement in evidence.

H. L. GILMAN, having been duly sworn, testified as follows:

Mr. Goodgold:

Q. Will you state the nature and extent of your agreement of employment with Felt & Tarrant Mfg. Co.?

A. I am employed here to run a crew of men known as the New York office.

[fol. 64] Q. What do you mean crew of men?

A. We have 10 to 12 men.

Q. When you say we?

A. I say 10 or 12.

Q. What are they?

A. We call them sub-solicitors.

Q. What are their duties?

A. To go out and solicit orders.

Q. What other functions do you perform for Felt & Tarrant?

A. That they perform?

Q. That you and the sub-solicitors perform for the company?

A. The only way we make money is to go out and solicit orders from customers.

Q. That's not my question. What duties do you perform for the Felt & Tarrant Co. other than soliciting orders?

A. Train men. Get men to go out to sell machines.

Q. Do you train them to be salesmen?

A. Train them to be salesmen and demonstrate, so that they know about the business.

Q. Do you to train the men maintain a school?

A. We have a school over there, yes.

Q. What kind of school?

A. I don't know so far as salesmen. I don't have enough to call it a school. We have one or two men at a time.

Q. What other duties do you perform at 299 Broadway?

A. That is all.

Q. You received the merchandise consigned to the customers to the City of New York?

A. Yes.

Q. Do you open the cartons?

A. I don't open them. The Comptometer Company opens it.

Q. In other words, the Comptometer Company also has offices?

A. No we have a crew of men together.

[fol. 65] Q. A crew of men from where?

A. 299 Broadway.

Q. For whom are they working for?

A. For the Comptometer Company.

Q. Are they permanently stationed at 299 Broadway?

A. Yes.

Q. Then the Felt & Tarrant Co. thru the Comptometer Company does the repair and service at 299 Broadway?

Mr. Fox: That is a conclusion.

Mr. Goodgold:

Q. Who does that?

A. The Comptometer Company.

Q. Then I say, following that statement——

A. You asked me what I did. I said the Comptometer Company also performs services and repairs at 299 Broadway for the Felt & Tarrant Co.

Mr. Fox:

Q. For customers?

A. They go out and take care of the work. A machine breaks down. They go out and repair it or bring it in for repair.

Mr. Goodgold:

Q. I am not talking about that. I am talking about a shipment of any machine sold to a customer, shipped to 299 Broadway. After having reached its destination it is discovered the machine is not in working order, and it is necessary to put it in working order and for that purpose the Comptometer Company has its men there who perform that service?

A. Yes.

[fol. 66] Q. Then I ask you isn't the Comptometer Company performing these services in behalf of Felt & Tarrant Co. in the City of New York?

A. I think that's obvious.

Q. Right.

—. ——.

Q. How big a supply of machines do you carry in the New York office?

A. We don't carry any machines in New York City for sales purposes.

Q. I didn't ask that. I asked how big a supply?

A. It varies from 250-300 machines.

Q. Do you have that many types of machines in different sizes? How many types of machines?

A. 1.

Q. How many sizes?

A. We have two machines; one, hand-driven and one electrical driven.

Q. Aside from that difference, is there any other difference?

A. No, except size.

Q. How many sizes?

A. 4.

Q. Can you say how many hand driven?

A. We have—it varies.

Q. Altogether you have 250?

A. 250-300.

Q. Would you say 25% hand driven and——

A. Yes.

Q. 75% hand and 25% electrical driven; and that proportion of sales?

A. I wouldn't say that is the proportion of sales. I don't believe we sell—I don't know what our percentage of electrical machines would be at the moment.

Q. How many sizes of the hand driven machines have you?

A. 3.

Q. So that you would say of the hand machines there would be 225 in number and 75 electrical driven, and that of the hand machines you would have of each size on the [fol. 67] average of about 110 machines?

A. Well, I wouldn't like to talk about—I am just guessing. When you ask how many—I don't know whether 250 or 300.

Q. Based on your own figure?

A. That is an estimated figure.

Q. Suppose you say 75 machines. Assume you had 75 of each size. Assume you had 225 hand driven and of the electrical machines you would have 25——

A. 75.

Q. 75 all told. About 25 in each size? That is the quantity constantly on hand?

A. Some of it.

Q. Ever go above?

A. I don't know off-hand.

Q. Do you ever get orders from customers calling for immediate shipment and you are required to ship one of the machines from the New York office?

A. No. It never happens.

Q. What are the normal requirements of New York customers. What is the greatest number of machines in one day. Hand driven?

A. That would be hard to answer.

Q. Do you know?

A. No.

Q. Can you estimate?

A. No.

Q. You handle all shipments that come through the office?

A. Yes.

Q. You have been there a great many years?

A. About 4 years.

Q. Haven't you a rough idea of what the requirements in the City of New York are?

A. I have a vision of what I would like for it to be. But what it has been since I have been here, it is——

Q. Would you say the daily requirements are 10 machines?

A. No.

Q. Would you say less?

A. Very much less, yes.

Q. Why is it necessary to carry such a large supply of [fol. 68] machines in the show room?

A. We have 10, 11, 12 on the street working.

Q. But you have 300 machines?

A. The men have a good number of trials. We have repair loans. Machines break down. They are brought to the office for repairs. We might use 50 or 60 or 100 for repair loans.

Q. Still you would have approximately 240 machines available for demonstration purposes?

A. Those machines in stock are used wholly for repair loans. What we mean by repair loans—a machine may break down. We put a machine on trial and it is brought in. The customer may take 3 weeks to decide whether he wants it.

Q. Does it happen that the machine in the customer's possession breaks down so that it requires removal and return to Chicago, and you in turn are required to furnish him one of the machines kept in your show room?

A. Yes.

Q. And often times that machine remains permanently with the customer?

A. Never.

Q. How long a time does the machine remain in the New York office after receipt from the home office?

A. They will remain possibly one day, 2 days.

Q. What determines the period of time it remains in New York office?

A. As soon as boys get to it. Depends on how much is wrong with it.

Q. What is the longest period of time it remains in New York before being shipped to the New York customer?

A. Not more than 3 or 4 days.

Q. That is if nothing is wrong with the machine?

A. Even if there is something wrong. We get lots of machines with nothing wrong. They are tested and sent [fol. 69] right out. But at the longest 3 or 4 days. The funny thing about it. The fellow buys a machine. Why he wants it and they call very often, "When will I get my machine"?

Q. The fact is they have a trial machine?

A. Don't seem to help.

Q. Would you say in addition to selling by soliciting and sub-solicitors and the services rendered by the Comptometer Company that you also render further service in that it is your duty to replace broken down machines with those held in stock in the New York office?

A. In the form of trials or repair loans.

Q. After a machine breaks down and you are required to furnish customers with another machine that is furnished from the New York office, what is the longest period of time that machine remains in possession of others?

A. That varies.

Q. Approximately the longest period?

A. Possibly 30 days at most. Maybe longer—hard to tell.

Q. Suppose through the negligence of the customer the machine is destroyed by fire or for some other reason destroyed, are you obligated to furnish them with another machine?

A. I would say we were. I haven't had a case of that sort.

Q. What do you base that answer on?

A. I will say we haven't had one of that sort since I have been in New York, nor have we had machines lost.

Q. What is the understanding with the customer when a machine is furnished from the New York stock? Is the company obligated to furnish him with a new machine? [fol. 70] A. Why we give him the new machine when our machine is destroyed.

Q. Would you say there is no obligation on the part of the company to give him a new machine if that machine is destroyed by fire or otherwise?

A. It wasn't his machine destroyed, as I understand. It is our machine, so why give a machine because our machine is destroyed.

Q. Would you say there was an offset?

A. The only obligation we have is to take care of his machine while in our possession and that is the machine we have in for repair.

Q. Well, would you consider it as a fact that you have performed your part of the obligation when you supply him with that machine from the show room, and you are under no further obligation?

A. We do it every day; they go in and out.

Q. Would you say that is a transaction completely within the City of New York?

A. I don't suppose it is anywhere else.

Q. No question. You don't raise the question of interstate commerce there, do you?

A. No.

Q. Who pays the freight from Chicago to New York City?

A. On sold machines? Felt & Tarrant Co.

Q. Are orders marked F. O. B. Chicago, Illinois?

A. No, I don't know they are. Sometimes people put F. O. B.

Q. Would you say the sale takes place in the City of New York?

A. Would I say? We take the order in New York.

Q. You wouldn't say the sale takes place in Chicago?

A. I don't know that is my place to answer. I think that is a question of law.

Q. It is a question of law.

[fol. 71] Q. Would the customer pay for the machine if it weren't delivered to him in New York City?

A. I wouldn't if I was the customer.

Q. If a machine is lost in transit, the loss would fall on Felt & Tarrant, not on customer?

Mr. Fox: That is a question of law.

Mr. Goodgold:

Q. You guarantee a customer delivery of the machine?

A. I don't know anything else you call it.

Q. Then you call it guarantee?

A. We take an order. I don't know of guarantee.

Q. You wouldn't consider a sale has been made, until there has been an actual delivery to the customer in New York?

A. Again I think you can answer it yourself. It is obvious.

Q. I have no further questions.

Mr. Fox:

Q. Mr. Gilman, under your agreement with the company as principal solicitor, are you instructed in any way as to making sales?

A. I personally? Mr. Nevins said that, when I came to New York in 1932, "I don't care if you don't go into a customer's office. In fact I just hope you won't take an order, or that you will solicit an order. You get those fellows to get that business."

Q. Are you permitted under your agreement with the company to sell comptometer machines to any customer?

A. To any customer?

Mr. Goodgold: I think that is askin for a conclusion.

[fol. 72] Mr. Fox:

Q. Can you under your agreement with the company sell and deliver a cu tomer in New York?

A. I can take an order.

Q. That isn't what I asked?

A. That's all I can do.

Q. You are restricted to soliciting orders. Have you any authority to sell under your agreement?

A. No, in the sense I understand you mean sell.

Q. Under the sub-solicitor's agreement, have they any authority to sell and deliver machines in New York?

A. No, sir.

Q. Are they restricted by the sub-solicitor's agreement in that respect?

A. The contract states that.

Q. What does the contract state?

A. It is mutually understood and agreed——

Mr. Goodgold: I think the contract speaks for itself.

Mr. Fox:

Q. What is the clause? The number?

A. No. 1 on page 3.

Q. That is a restriction on the sub-solicitor as to his authority?

A. That is right.

Q. Now, this replacing of one of the machines that is broken down with machine from your office, is any charge made for that service?

A. Is there any charge made for it?

Q. For repair?

A. We charge for repair.

Q. Do you charge him, do you make a charge for furnishing him with a replacement machine?

A. No, sir.

[fol. 73] Q. No rental charge? It is gratis, free?

A. Yes.

Q. For the purpose of maintaining the good-will?

A. Yes. But again you are talking about the Comptometer Company and not the Felt & Tarrant Co.

Q. These 250-300 machines, are they owned by Felt & Tarrant or by the Comptometer Company?

A. They are owned by Felt & Tarrant.

Q. They are under the custody and control of Comptometer Company?

A. Yes.

Q. They perform, the Comptometer Company performs the service free of charge?

A. Right.

Q. As to the services by the Comptometer Company, have taxes been paid to the City of New York?

A. Yes.

Q. Have returns been regularly filed?

A. Yes.

Q. I don't know of anything else.

Mr. Goodgold:

Q. Is there anybody else authorized to make sales in the City of New York, other than——

A. No, sir.

Q. If the sub-solicitors and the solicitor do not make sales, who else makes it?

A. We solicit orders. The sub-solicitors solicit orders.

Q. The contention is made that you don't make sales, except that you solicit orders?

A. Again I say it is a question for you folks to decide.

Q. Is anybody else authorized to contact customers?

A. No.

Q. You have exclusive right to solicit trade?

A. Yes.

Q. These men assigned to do repair service by the Comptometer Company, are they under your jurisdiction? Do [fol. 74] you act as manager for the Comptometer Company too?

A. No.

Q. Are you in their employ?

A. No.

Q. Do you receive any compensation from the Comptometer Company?

A. No. Any compensation comes from Felt & Tarrant.

Q. Is the Comptometer Company a wholly owned corporation by the Felt & Tarrant Mfg. Co.?

A. I don't know; I couldn't answer.

Q. Do you, Mr. Nevins?

Mr. Nevins: Yes. It is subsidized.

Mr. Goodgold:

Q. Same stockholders?

A. It is controlled. A majority of the stock is held by Felt & Tarrant Company.

Q. Will you state what percentage of control it is?

A. I couldn't do that.

Q. Can you find out for us?

A. Yes.

Q. Will you also submit that with the others?

A. I don't see that it makes any difference. I would say it is wholly or practically controlled. I don't know just what they are. To answer for this purpose, I would say wholly controlled.

Q. I have no further questions unless you want to submit a brief or memorandum of law.

Mr. Fox: We already have a brief on file.

Mr. Goodgold: I thought that after the hearing and testimony today, you might further desire——

Mr. Fox: I may submit another brief.

Mr. Goodgold: Decision is reserved.

[fol. 75] TAXPAYER'S EXHIBIT 1—TYPICAL ORDER BLANK

(Face)

Order Blank

Felt & Tarrant Mfg. Co., Chicago, Ill.

GENTLEMEN:

Kindly enter our order for the following Comptometers:

Quality	Style	Size	Price	Serial Numbers
		12-Column	$400	
		10-Column	$350	
				Total

Terms: 30 days net. Not subject to quantity or cash discount.

Purchaser: ——, by ——, Official Capacity: ——, Street Address: ——, City: ——.

Solicitor: ——.
Date: ——, ——.

All orders subject to the acceptance of an officer of the company in Chicago.

Form 86.

[fol. 76] (Reverse)

The following is a copy of the guarantee covering the Comptometer you are purchasing. This guarantee is printed on the face of the bill you will receive.

We hereby Guarantee to keep the above

Comptometer

while in possession of ——

in complete repair for one year from date free of all charge for repairs. Accidents caused by willful negligence and loss by fire or water excepted only. Not responsible for carrying charges incurred.

Felt & Tarrant Mfg. Co.

[fol. 77] TAXPAYER'S EXHIBIT 2—SUB-SOLICITOR'S AGREEMENT

Form 164. Printed in U. S. A.

Sub-Solicitor's Agreement

This Agreement made the fifteenth day of July 1934, between H. L. Gilman of the City of New York City in the State of New York of the First Part, and C. F. Witkowski of the City of New York in the State of New York of the Second Part.

Witnesseth That the party of the First Part is authorized by Felt & Tarrant Manufacturing Company a corporation incorporated under the laws of the State of Illinois, and located and doing business in the City of Chicago, in said State, to solicit, personally and through sub-solicitors, orders for Comptometers in the following named territory and that the party of the First Part hereby employs the party of the Second Part to solicit orders for Comptometers manufactured by Felt & Tarrant Mfg. Co., Chicago, Illinois, in the territory comprising Territory #2 (Fulton Street South to Rector & Wall Street—River to River), and temporarily Territory #3 (Fulton Street North to Chambers Street, River to River).

for the period of one year from date of this contract, upon the following terms and conditions:

[fol. 78] The Party of the First Part Agrees

1. To pay to the party of the Second Part a salary of ninety-five dollars ($95.00) per month during the life of this contract, and in addition, a commision on each machine sold by party of the Second Part, to be used in said territory, whose sale is approved and accepted by the Felt & Tarrant Mfg. Co. in each six months' period, starting with the date of this contract, according to the following schedule: 5% on the first six machines sold in each six months' period, 10% on the second six machines sold in each six months' period, 15% on the third six machines sold in each six months' period, and 20% on all machines sold in excess of eighteen in each six months' period.

2. That the commission on each machine sold under this contract shall be due and immediately payable when full payment has been made for each Comptometer so sold.

3. That all orders taken by the party of the Second Part and accepted by the Felt & Tarrant Mfg. Co. will be filled as promptly as possible.

4. That party of the First Part will credit the party of the Second Part the Commission upon all good and valid orders for Comptometers received from responsible parties within said territory during the life of this contract on whom party of the Second Part has called and demonstrated the Comptometer within three months preceding the date of said order, and immediately reported to the Felt & Tarrant Mfg. Co.

[fol. 79] The Party of the Second Part Agrees

1. Whereas, party of the First Part and Felt & Tarrant Mfg. Co. have been to large expense in teaching and training Second Party to become a solicitor of Comptometers, adding and calculating machines; and

Whereas, there are other persons, firms and corporations in the United States manufacturing and selling adding and calculating machines who are competitors of the Felt & Tarrant Mfg. Co., and

Whereas, now that Second Party has been taught and trained at the expense of the party of the First Part and Felt & Tarrant Mfg. Co. to be a successful solicitor and salesman of such machines, such competing concerns may seek to hire Second Party away from First Party during the period covered by this contract, or seek to induce Second Party not to renew this contract at its expiration, thereby causing First Party and Felt & Tarrant Mfg. Co. great loss and depriving them of the benefit of the skilled services of Second Party so acquired at the expense of Felt & Tarrant Mfg. Co. and First Party;

Now, Therefore, in consideration of the foregoing, and in consideration of First Party employing Second Party as a solicitor by and under this contract, Second Party covenants and agrees with First Party that during the term covered by [fol. 80] this contract and for a period of two years thereafter, and for a period of two years after he ceases to be a solicitor for First Party, he will not become a solicitor for any person, firm or corporation engaged in the manufacturing or selling of adding or computing machines in the United States.

2. To devote his entire time and attention to the solicitation of orders for the Comptometer, and not to interest himself directly, or indirectly, in selling, soliciting orders for, or commending any other computing machines, designed for any numerical calculation.

3. To make daily reports of everything done under this contract upon forms supplied by the Felt & Tarrant Mfg. Co. and to report such other information as may be requested.

4. To solicit no order at less than the regular fixed price by the Felt & Tarrant Mfg. Co. and not to offer any rebate, or division of commission, gift or other thing, as an inducement to obtaining an order, except to take old or second-hand Comptometers in trade, on the terms stated below in paragraph 4 under "It is mutually understood and agreed."

5. That under no conditions shall he buy an old or second-hand Comptometer on his own account.

6. To return all Comptometers in his possession or placed by him on trial, or otherwise under his direction, and not [fol. 81] sold by the party of the First Part, within 30 days after the termination of this contract, and in default thereof to pay the full selling price to the party of the First Part. The said 30 days being also given the party of the Second Part to close any orders for machines on trial on the termination of this contract.

7. To return on demand or on termination of this contract to the Felt & Tarrant Mfg. Co., Chicago, all office records, correspondence and General Sales Bulletins which may have been sent to him during the life of this contract.

8. To personally make at least four calls per day on parties theretofore uninterested in the Comptometer and demonstrate its uses and workings to them.

It is Mutually Understood and Agreed

1. That the said party of the Second Part is merely a solicitor for orders, and that all orders taken must be submitted to and approved by the Felt & Tarrant Mfg. Co. and

that all sales and deliveries shall be made by the Felt & Tarrant Mfg. Co.

2. That all Comptometers shipped by the Felt & Tarrant Mfg. Co. under this contract shall remain the property of the Felt & Tarrant Mfg. Co. until actually sold and paid for.

[fol. 82] 3. That where an order for a Comptometer is accepted with the understanding that a second-hand Comptometer be taken by the Felt & Tarrant Mfg. Co. in part payment, the commission will be paid only on the amount of cash received. The old or second-hand Comptometer is to be the exclusive property of the Felt & Tarrant Mfg. Co.

4. That in case an old or second-hand Comptometer is taken in trade no allowance to exceed $30.00 for any Comptometer over three years old shall be made; no allowance to exceed $40.00 for any Comptometer which exceeds two years old; none to exceed $60.00 for any Comptometer which exceeds one year old. In no case is more than one old Comptometer to be taken in trade on account of each new Comptometer sold, and in no case is any wooden-box Comptometer to be taken in trade.

5. That the party of the Second Part shall not collect any moneys due upon sales under this contract, but that all payments shall be made directly to the Felt & Tarrant Mfg. Co.

6. That the agreement herein contained on the part of the party of the Second Part shall be performed in all respects to the satisfaction of Felt & Tarrant Mfg. Co. subject to cancellation of this agreement; or the Felt & Tarrant Mfg. Co. may, at its option, solicit orders for Comptometers in the above described territory directly, by mail, by advertisement or otherwise, and fill orders received from such solici-
[fol. 83] tation without being obliged to credit a commission to the party of the Second Part.

7. That no Comptometer shall be sold in the said territory at less than the regular printed price and on the terms set forth in the latest price list and circular matter issued from time to time by the Felt & Tarrant Mfg. Co.

8. That this contract, though signed, is subject to the approval of the Felt & Tarrant Mfg. Co. and shall not be binding until the approval of said Company is endorsed thereon.

9. That this agreement shall bind the heirs, legal representatives, successors, and assigns, of the parties hereto, but that the party of the Second Part shall not assign this contract without the written consent of the party of the First Part.

10. That educational and rebuilt machines are now at a reduced price and carry a reduced commission as follows: Commissions to agents and salary and commission basis are a flat 10%. These sales do not count on the sliding scale contract and consequently do not increase the commission rate on subsequent commercial orders.

Witness the hands and seals of the parties the day and year first above written.

Approved 7/16/34.

C. F. Witkowski (L. S.). Felt & Tarrant Mfg. Co.,
J. C. Nevins, Vice-President. H. L. Gilman.

[fol. 84] TAXPAYER'S EXHIBIT A—TYPICAL SHIPPING ORDER AND ENVELOPE

Shipping Order

Exhibit "A"

No. .....

Model: ..... Columns: ..... Purpose: .....

Shipped from Chicago .....
To .....
.....

Form 238. Printed in U. S. A.

Envelope

No. .....

Model: ..... Columns: ..... Purpose: .....

Shipped from Chicago .....
To .....
.....

[fol. 85] TAXPAYER'S EXHIBIT B—TYPICAL INVOICE AND FIVE CARBON COPY RECORDS

(Invoice)

Exhibit "B"

Felt & Tarrant Mfg. Co.,
1735 North Paulina Street,
Chicago, U. S. A.

(Cut) Sales Offices in 107 of the Largest Cities in United States and Canada. Foreign Sales Offices in all Principal Countries of Europe and South America and in Australia, Mexico and India.

Sold to ——. Order No. —.

In Remitting Please Show the Following
Invoice No. E 09934.

Terms: 30 Days Net. Not Subject to Cash Discount

Make All Checks Payable to Company

Remit Directly to Chicago

Clear-Signal, Controlled-Key Comptometer

8-Column Model J @ 300.00 #
10-Column Model J @ 350.00 #
12-Column Model J @ 400.00 #

[fol. 86] We hereby guarantee to keep the above Comptometer in complete repair for one year from date free of all charge for repairs, while in possession of above purchaser, accidents caused by negligence and loss by fire or water excepted only. Not responsible for carrying charges incurred.

Felt & Tarrant Mfg. Co.

Form 1050.
Printed in U. S. A.

Carbon Copy "Record"—Invoice No. E9934.
Carbon Copy "Journal-Sheet"—Invoice No. E9934.
Carbon Copy "Ledger Sheet"—Invoice No. E9934.
Carbon Copy "Accounting Dept. Commission Copy"—Invoice No. E9934.
Carbon Copy "Agent's Copy of Invoice"—Invoice No. E9934.

[fol. 87] LETTER, DATED MAY 4, 1936, FROM THE DEPARTMENT OF STATE

Edward J. Flynn, Secretary of State.
Frank S. Sharp, Deputy Secretary, Chief of Division.

(Seal)

State of New York
Department of State, Division of Corporations,
Albany

GMC46. Albany May 4, 1936.

Adrian C. Humphreys, 42 B'way, N. Y. City.

DEAR SIR:

This office is in receipt of your favor of the 30th ult. It does not appear from our records that Felt and Tarrant Manufacturing Company, United Autographic Register Company, Illinois corporations, The Mani-fold Company, or The Globe Register Company, Ohio corporations have filed qualifying papers or received authority to do business in this state.

Comptometer Co., a Delaware corporation, received authority to do business in this state, June 28, 1935.

Yours truly, Frank S. Sharp, Chief of Division.

[fol. 88] DOCUMENT NO. 9, ANNEXED TO RESPONDENT'S RETURN

(Determination of the Comptroller, Dated June 24, 1936)

(Letterhead of The City of New York, Department of Finance, Emergency Revenue Division)

June 24, 1936.

In re Felt & Tarrant Mfg. Co., 200 Broadway, N. Y. C.

Period: 12/10/34 to 8/31/35.

Principal	$18,200.00
Interest	1,846.00
Total	$20,046.00

Felt & Tarrant Mfg. Co., 299 Broadway, New York, N. Y.

GENTLEMEN:

A careful analysis of the testimony taken at the hearing held in this office on April 29, 1936, in connection with the Comptroller's determination of your tax liability to the City of New York, pursuant to Local Law #20 of 1934, as amended, for the period from December 10, 1934 to August 31, 1935, discloses that you are engaged in the sale of tangible personal property at retail within the City of New York and that these sales are made through your solicitor and sub-solicitors.

[fol. 89] Although delivery of the machines sold to your customers in the City of New York is made therein from your home office in Chicago, Ill. the contracts pursuant to which these sales are made do not specifically require that delivery must be made from points outside the City or State of New York.

The testimony also shows that you maintain a sufficient quantity of machines in your New York office from which deliveries could be made and that there is nothing in your sales contracts to prevent your Company from making sales in the City of New York from such stock. The testimony also shows that the machines which are shipped from a point outside the City of New York are delivered to your New York office where they are repaired if necessary and assembled or adjusted, as the case may be, and after several days are delivered to your customers in the City of New York.

Based upon the above facts you are hereby notified that the determination hereinabove is hereby declared final and irrevocable.

The tax, including interest, on this determination is $20,046 and must be paid to the City of New York within five days from the date hereof.

In the event of your failure to pay the amount of tax due, the Comptroller will issue a warrant in accordance with Section 8 of Local Law #20 of 1934, as amended, which provides in part as follows:

"Whenever any vendor * * * shall fail to pay over any tax and/or to pay any tax or penalty imposed by this [fol. 90] Local Law * * * the Comptroller may issue a warrant, directed to the Sheriff of any County within the

City of New York, commanding him to levy upon and sell the real and personal property of the vendor * * * which may be found within the County, for the payment of the amount thereof, with any penalties, and the cost of executing the warrant * * *."

When making your remittance attach thereto this letter or a copy thereof.

Very truly yours, Milton Solomon, Deputy Comptroller.

[fol. 91] DOCUMENT NO. 10, ANNEXED TO RESPONDENT'S RETURN

(Letter, Dated July 7, 1936, to the Department of Finance)

(Letterhead of Adrian C. Humphreys)

July 7, 1936.

The City of New York, Department of Finance, 50 Lafayette Street, New York City.

Attention Milton Solomon, Deputy Comptroller

In re Felt & Tarrant Manufacturing Co.

GENTLEMEN:

Reference is made to your letter dated June 24, 1936, determining a sales tax liability, pursuant to Local Law #20 of 1934, as amended, for the period from December 10, 1934 to August 31, 1935, in the principal sum of $18,200 and interest of $1,846 a total of $20,046.

The above determination is based upon estimated sales during the taxable period of $917,829.30, whereas the total actual sales for the period in question were $111,755 and from that figure should be deducted sales amounting to $13,530 which are exempt from tax as having been made to the Federal Government, to the State of New York, to the City of New York, to educational institutions, etc.

At a conference held on July 6, 1936, by our attorney Newton K. Fox, Esq., and Messrs. Solomon and Sheehan [fol. 92] an agreement was reached to reopen the case and determine the actual amount of sales by having an auditor

from your Department proceed to the offices of the Company at 1735 North Paulina Street, Chicago, Illinois, to verify the figures from the books and records of the Company.

Attached hereto is the Company's check for $125 drawn to the order of Frank J. Taylor, Comptroller City of New York, to cover the traveling and incidental expenses of the auditor and it is requested that the audit be begun and completed at the earliest possible date.

It is further requested that the determination of tax liability by letter dated June 24, 1936, be set aside and cancelled, that the case be reopened and a re-hearing granted after the audit is completed.

Respectfully, Felt & Tarrant Mfg. Co., By Newton K. Fox, Attorney.

NKF:PC.

[fol. 93] DOCUMENT No. 11, ANNEXED TO RESPONDENT'S RETURN

(Letter, Dated July 20, 1936, to Felt & Tarrant Mfg. Co.)

(Letterhead of The City of New York, Department of Finance, Emergency Revenue Division)

July 20th, 1936.

In re Felt & Tarrant Mfg. Co.

Taxable Period: 12/10/34 to 8/31/35

Felt & Tarrant Mfg. Co., 299 Broadway, New York, N. Y.

GENTLEMEN:

With reference to the letter dated July 7, 1936, from your attorney, and the Comptroller's determination of your tax liability to the City of New York pursuant to Local Law No. 20 of 1934, as amended, for the period from December 10, 1934, to August 31, 1935, as stated in Department letter dated June 24, 1936, this will advise you that the determination is held in abeyance, an audit will be made and the tax liability for the period in question will be determined.

Your legal rights to certiorari proceedings from the said

determination of tax liability are preserved without prejudice.

Very truly yours, Milton Solomon, Deputy Comptroller.

MF.

[fol. 94] DOCUMENT No. 12, ANNEXED TO RESPONDENT'S RETURN

(Report After Audit with Annexed Exhibits)

Name: Felt & Tarrant Mfg. Co.
Address: 1735 N. Paulina St. Chicago, Ill.

Registration Number M-1195-98.

Tax Deficiency Period Ended	Principal	Interest	Total
2/28/35	$727.47	160.04	887.51
5/31/35	772.97	146.86	919.83
8/31/35	555.33	88.85	644.18
12/31/35	1162.24	139.47	1301.71
Total	$3218.01	535.22	3753.23

Felt & Tarrant Mfg. Co., 1735 N. Paulina St., Chicago, Ill.

GENTLEMEN:

The Comptroller hereby gives notice that based upon the exhibits and schedules hereto attached he has determined that there is due and payable to the City of New York a deficiency of $3753.23 in the amount of the tax (including interest and/or penalties) for the period from December 10, 1934, to December 31, 1935, pursuant to Local Law No. 20 of 1934, as amended.

Notice is hereby given that this determination shall finally and irrevocably fix the amount of tax due unless application in writing is made by you for a hearing thereon within [fol. 95] thirty days after date hereof.

Section 15 of Local Law No. 20 of 1934, as amended, provides in part as follows:

"Any person failing to file a return or to pay over any tax to the Comptroller within the time required by this

Local Law shall be subject to a penalty of five per centum of the amount of tax due, plus one per centum of such tax for each month of delay or fraction thereof excepting the first month after such return was required to be filed or such tax became due * * *."

In the event of your failure to make application for a hearing within the time specified or to remit the tax assessed, the penalties as provided for in Section 15 hereinabove will become operative.

If you agree with the determination of your tax liability as stated above please remit the amount due together with this notice or a copy thereof, within thirty days after the date hereof.

Yours very truly, Milton Solomon, Deputy Comptroller.

[fol. 96]

EXHIBIT "A"

The City of New York—Department of Finance—Emergency Revenue Division, 50 Lafayette Street, New York, N. Y.

Name of Taxpayer: Felt & Tarrant Mfg. Co.
Address: 1735 N. Paulina St., Chicago, Ill.
Registration No. M-1195.
Local Law No. 20 of 1934, as amended.
Period Audited 12/10/34 to 12/31/35.
Accountant Ben Pecker.
* Indicates Deduction.

Item No.	Receipts from Sales and Services as Adjusted	Total	Period Audited 12/10/34 to 2/28/35	3/1/35 to 5/31/35	6/1/35 to 8/31/35	9/1/35 to 12/31/35	Sch. No.
A	Tax Due the City of New York as reported (Item 10 of return)		80.64	75.95	17.48	—0—	
B	Add—Tax—Two per centum of additional taxable receipts (Exhibit "C")		727.47	772.97	555.33	1162.24	
C							
D	Total tax (Items A to C inclusive)		808.11	848.92	572.81	1162.24	
E	Amount of tax—Two per centum of total receipts as adjusted (Exhibit B)	3392.08	808.11	848.92	572.81	1162.24	
F	Tax due the City of New York (Item D or E, whichever is greater)	3392.08	808.11	848.92	572.81	1162.24	
G	Amount of tax Paid	174.07	80.64	75.95	17.48	—0—	
I	Balance of Tax unpaid (Item F minus Item G)	3218.01	727.47	772.97	555.33	1162.24	
			22%	19%	16%	12%	
	Add: Penalties or Interest to	535.22	160.04	146.86	88.85	139.47	
	Total tax due the City of New York (Item H plus Item I)	3753.23	887.51	919.83	644.18	1301.71	

[fol. 97] EXHIBIT "B"

City of New York—Department of Finance—Emergency
50 Lafayette Street, New York, N. Y.

Name of Taxpayer: Felt & Tarrant Mfg. Co.
Address: 1735 N. Paulina St., Chicago, Ill.
Registration No. M-1195.
Local Law No. 20 of 1934, as amended.
Period Audited 12/10/34—12/31/35.
Accountant Ben Pecker.
* Indicates Deduction.

Item No.	Receipts from Sales and Services as Adjusted	Period 12/10/34 to 2/28/35	3/1/35 to 5/31/35	6/1/35 to 8/31/35	9/1/35 to 12/31/35	Sch. No.
1	Receipts from Sales (Not included in Items 2 or 3)	41593.37	53050.76	34507.22	94394.22	
2	Receipts from installment sales	.....	.....	.....	.....	
3	Receipts from Sales and Services of gas, electricity, refrigeration, etc.	.....	.....	.....	.....	
4	Value of property purchased without tax used by you or in your business	1112.17	1170.00	810.00	1616.00	
5	Total Receipts (Items 1 to 4 inclusive)	$42705.54	54220.76	35317.22	96010.22	

[fol. 98]

	Less: Allowable Deductions (Items 11 to 20 incl.)					
11	Receipts from sales for purpose of resale	.....	.....	.....	.....	
12	Receipts from sales of food products	.....	.....	.....	.....	
13	Receipts from sales of food in restaurants where the charge per patron is less than $1.00	.....	.....	.....	.....	
14	Receipts from sales to Federal, State and Municipal agencies	390.00	9845.00	3405.00	9960.00	
15	Receipts from sales delivered outside the City	640.00	1270.00	2040.00	26758.00	
16	Receipts from sales to Semi-public institutions	.....	.....	.....	.....	
17	Cash Discounts taken at time of sale and Trade Discounts	.....	.....	.....	.....	
18	Credits allowed on property accepted in part payment and intend for resale	1270.00	660.00	855.00	1180.00	
19	Credits allowed on property returned, cancelled sales and defective merchandise	—0—	—0—	377.17	—0—	
20	Other allowable deductions permitted by the law or regulations	.....	.....	.....	.....	
21	Total Allowable Deductions (Items 11 to 20 incl.)	$ 2300.00	11775.00	6677.17	37898.00	
	Total Taxable Receipts as Adjusted (Item 5 minus 21)	$40405.54	42445.76	28640.05	58112.22	

See Exhibit A for Computation of Tax. Item numbers correspond with Item numbers on return.

[fol. 99]

EXHIBIT "C"

City of New York—Department of Finance—Emergency
50 Lafayette Street, New York, N. Y.

Name of Taxpayer: Felt & Tarrant Mfg. Co.
Address: 1735 N. Paulina St., Chicago, Ill.
Registration No. M-1195.
Local Law No. 20 of 1934, as amended.
Period Audited 12/10/34—12/31/35.
Accountant: Ben Pecker.
* Indicates Deduction.

Item No.	Summary of Additional Taxable Receipts	Period 12/10/34 to 2/28/35	3/1/35 to 5/31/35	6/1/35 to 8/31/35	9/1/35 to 12/31/35	Sch. No.
	Add—Taxable Receipts not Reported.					
1	Receipts from sales	37561.37	49253.46	33633.64	94394.22	1
2	Receipts from installment sales	.....	.....	.....	.....	
3	Receipts from Sales and Services of gas, electricity, refrigeration, etc	.....	.....	.....	.....	
4	Value of property purchased without tax used by you or in your business	1112.17	1170.00	810.00	1616.00	2
5	Total taxable receipts not reported (Items 1 to 4 inclusive)	$38673.54	50423.46	34443.64	96010.22	
[fol. 100]						
	Add—Deductions Disallowed:					
11	Receipts from sales for purpose of resale	.....	.....	.....	.....	
12	Receipts from sales of food products	.....	.....	.....	.....	
13	Receipts from sales of food in restaurants where the charge per patron is less than 1.00					
14	Receipts from sales to Federal, State and Municipal agencies	390.00	9845.00	3405.00	9960.00	3
15	Receipts from sales delivered outside the City	640.00*	1270.00*	2040.00*	26758.00*	4
16	Receipts from sales to Semi-public institutions	.....	.....	.....	.....	
17	Cash Discounts taken at time of sale and Trade Discounts	.....	.....	.....	.....	
18	Credits allowed on property accepted in part payment and intended for resale	1270.00*	660.00*	855.00*	1180.00*	5
19	Credits allowed on property returned, cancelled sales and defective merchandise	—0—	—0—	377.17*	—0—	6
20	Other deductions permitted by the law or regulations	.....	.....	.....	.....	
21	Total Deductions Disallowed (Items 11 to 20 incl.)	2300.00*	11775.00*	6677.17*	37898.00*	
	Total Additional Taxable Receipts (Item 5, plus 21)	$36373.54	38648.46	27766.47	58112.22	

See Exhibit A for Computation of tax. Item numbers correspond with Item numbers on return.

[fol. 101] Schedule C-1

Accountant: Ben Pecker
M-1195

Felt & Tarrant Mfg. Co., 1735 N. Paulina St., Chicago, Ill.

Item #1 of Return	12/10/34 to 2/28/35	3/1/35 to 5/31/35	6/1/35 to 8/31/35	9/1/35 to 12/31/35
Receipts from Sales:				
Amounts as reported	$4032.00	3797.30	873.58	0
Add—				
Additional Receipts from Sales, not reported (Note)	37561.37	49253.46	33633.64	94394.22
Amounts as adjusted	$41593.37	53050.76	34507.22	94394.22
Note—				
These amounts represent receipts from sales of machines in N. Y. City as per list prepared, not reported	$37345.00	48645.00	32825.00	93308.00
Add—				
Additional receipts from sale of parts	2237.93	2454.84	1207.89	1086.22
Add—				
Rentals of machines	2010.44	1950.92	474.33	0
Total receipts from N. Y. City sales as per list prepared a copy of which was left with your office for reference	41593.37	53050.76	34507.22	94394.22
Deduct—				
Amounts reported	4032.00	3797.30	873.58	0
Additional receipts not reported.	$37561.37	49253.46	33633.64	94394.22

[fol. 102] Schedule C-2

Item #4 of Return	12/10/34 to 2/28/35	3/1/35 to 5/31/35	6/1/35 to 8/31/35	9/1/35 to 12/31/35
Value of property purchased without tax used by you or in your business:				
Amounts as reported	$ 0.	0	0	0
Value of property purchased or used by you not reported (Note)	1112.17	1170.00	810.00	1616.00
Amounts as adjusted	$1112.17	1170.00	810.00	1616.00
Note—				
These amounts represent value of oil and parts used by you in your business as estimated from your total charges for each period	28.17	42.00	42.00	56.00
Add—				
Rental charges for machines used by the N. Y. City Comptometer school as per schedule prepared a copy of which was left with your office	1084.00	1128.00	768.00	1560.00
Total	$1112.17	1170.00	810.00	1616.00

[fol. 103] Schedule C-3

Accountant: Ben Pecker
M-1195

Felt & Tarrant Mfg. Co., 1735 N. Paulina St., Chicago, Ill.

Item #14 of Return	12/10/34 to 2/28/35	3/1/35 to 5/31/35	6/1/35 to 8/31/35	9/1/35 to 12/31/35
Receipts from sales made to Federal, State and Municipal agencies:				
As reported	$ 0	0	0	0
Receipts from sales made to Federal, State and Municipal agencies not reported (Note)	390.00	9845.00	3405.00	9960.00
As adjusted	$390.00	9845.00	3405.00	9960.00
Note—. These amounts represent receipts from sales made to the U. S. Gov't., to the State of New York and to the City of New York which are allowed	$390.00	9845.00	3405.00	9960.00

[fol. 104] Schedule C-4

Accountant: Ben Pecker
M-1195

Felt & Tarrant Mfg. Co., 1735 N. Paulina St., Chicago, Ill.

Item #15 of Return	12/10/34 to 2/28/35	3/1/35 to 5/31/35	6/1/35 to 8/31/35	9/1/35 to 12/31/35
Receipts from sales where the merchandise was delivered to points outside the City of New York:				
As reported	$ 0	0	0	0
Receipts from sales delivered outside the City of New York not reported (Note)	640.00	1270.00	2040.00	26758.00
As adjusted	$640.00	1270.00	2040.00	26758.00
Note— These amounts represent sales made in New York City where the merchandise was delivered outside New York City which are allowed	$640.00	1270.00	2040.00	26758.00

[fol. 105] Schedule C-5

Accountant: Ben Pecker
M-1195

Felt & Tarrant Mfg. Co., 1735 N. Paulina St., Chicago, Ill.

Item #18 of Return	12/10/34 to 2/28/35	3/1/35 to 5/31/35	6/1/35 to 8/31/35	9/1/35 to 12/31/35
Credits allowed on tangible personal property of similar kind accepted in part payment and intended for resale:				
As reported	$ 0	0	0	0
Credits for Trade-ins Allowances not reported (Note)	1270.00	660.00	855.00	1180.00
As adjusted	$1270.00	660.00	855.00	1180.00
Note—				
These amounts represent credits allowed on comptometers accepted in part payment and intended for resale which are allowed	$1270.00	660.00	855.00	1180.00

[fol. 106] Schedule C-6

Accountant: Ben Pecker
M-1195

Felt & Tarrant Mfg. Co., 1735 N. Paulina St., Chicago, Ill.

Item #19 of Return	12/10/34 to 2/28/35	3/1/35 to 5/31/35	6/1/35 to 8/31/35	9/1/35 to 12/31/35
Credits allowed on property returned, cancelled sales and defective merchandise:				
As reported	.....	.....	$ 0	.....
Credits on cancelled sales not reported (Note)	.....	.....	377.17	.....
As adjusted	.....	.....	$377.17	.....
Note—				
This amount represents credits for cancelled sales, which is allowed	.....	.....	$377.17	.....

[fol. 107] DOCUMENT NO. 13, ANNEXED TO RESPONDENT'S RETURN

(Letter, dated November 20, 1936, from Felt & Tarrant Mfg. Co. to Deputy Comptroller)

(Letterhead of Adrian C. Humphreys)

November 20, 1936.

Milton Solomon Esq., Deputy Comptroller, The City of New York, Emergency Revenue Division, 50 Lafayette St., New York, N. Y.

In re Felt & Tarrant Mfg. Co.

GENTLEMEN:

With reference to your letter dated July 20, 1936, request is hereby made for immediate determination of the Sales Tax liability, if any, of Felt & Tarrant Mfg. Co. of Chicago, Illinois, pursuant to Local Law #20 of 1934, as amended, for the period from December 10, 1934, to December 31, 1935.

A field audit of the books and records of the company at Chicago was made by Mr. Pecker as auditor for the City and a summary of his report is as follows:

[fol. 108]

	Periods			
	12/10/34 to 2/28/35	3/1/35 to 5/31/35	6/1/35 to 8/31/35	9/1/35 to 12/31/35
Item 1 Receipts from N. Y. C. Sales	$41,593.37	$53,050.76	34,507.22	94,394.22
4 Purchases subject to tax	1,112.17	1,170.00	810.00	1,616.00
5 Total Receipts	42,705.54	54,220.76	35,317.22	96,010.22
Allowable Deductions:				
14 Sales to Govt. agencies	390.00	9,845.00	3,405.00	9,960.00
Item 15 Outside Deliveries	640.00	1,270.00	2,040.00	26,758.00
18 Trade in Allowances	1,270.00	660.00	855.00	1,180.00
19 Cancelled Sales	.....	.....	377.17	.....
Total Allowable Deductions	2,300.00	11,775.00	6,677.17	37,898.00
Taxable Receipts as adjusted	40,405.54	42,445.76	28,640.05	58,112.22
Amount of tax 2% of total	808.11	848.92	572.80	1,162.24
Deduct tax paid	80.64	75.95	17.48	.....
Balance of Tax Unpaid	727.47	772.97	555.32	1,162.24
Penalties	146.95	146.86	88.85	139.47
Total Tax Due $3,740.14	874.42	919.83	644.18	1,301.71

[fol. 109] The Felt & Tarrant Mfg. Co. takes exception to the findings in said report that any sales tax is due or payable by this company to the City of New York because the sales of its products are consummated in Chicago, Illinois, the goods are appropriated to the order in Chicago, Illinois, and are thereafter shipped in interstate commerce.

The report covers New York City customers but does not give credit for machines upon which the customer paid the tax. Attached hereto is a list showing Invoice date, Name and Address of Customer, Comptometer No., Amount of Invoice and Tax Credit. Also attached are photostat copies of letters numbered 1 to 14 inclusive, showing payment of tax by New York City customers in the total sum of $630.70.

Claim for credit of $630.70 is therefore made against any tax found payable.

Respectfully, Felt & Tarrant Mfg. Co., by Newton K. Fox, Attorney.

NKF:PC.

[fol. 110] DOCUMENT No. 14, ANNEXED TO RESPONDENT'S RETURN

(Determination of the Comptroller, Dated February 13, 1937)

(Letterhead of The City of New York, Department of Finance, Emergency Revenue Division)

City Sales Tax.
Final Determination.
M-1195.

February 13, 1937.

Adrian C. Humphreys, Esq., 42 Broadway, New York City.

Re Felt & Tarrant Mfg. Co.

DEAR SIR:

Receipt is acknowledged of your letter of November 20, 1936, taking exception to the Comptroller's notice of determination of the tax due by Felt & Tarrant Mfg. Co., pursuant to Local Law #20 of 1934, as amended, for the period from December 10, 1934 to December 31, 1935, on the ground that this determination includes sales to New York City

customers who have paid the tax due thereon directly to the Comptroller of the City of New York.

A list of these sales together with photostatic copies of letters from the customers to the effect that they had paid the tax due on such sales was enclosed with your letter.

You are hereby advised that the amount of the Comptroller's determination is reduced by $630.70 which is the amount claimed to have been paid by your client's custom-
[fol. 111] ers directly to the Comptroller. This leaves a balance due amounting to $3,122.53.

This determination is final and irrevocable.

In the event of your client's failure to pay the tax due, the Comptroller will issue a warrant in accordance with the law. Section 8 of Local Law #20 of 1934, as amended, provides in part as follows:

"Whenever any vendor * * * shall fail to pay over any tax and/or to pay any tax or penalty imposed by this local law * * * the Comptroller may issue a warrant, directed to the Sheriff of any County within the City of New York, commanding him to levy upon and sell the real and personal property of the vendor * * * which may be found within the County for the payment of the amount hereof, with any penalties and the cost of executing the warrant * * *."

Payment of the amount due must be made within five days from the date hereof and this letter or a copy thereof should accompany your client's remittance: Checks and money orders should be made payable to the order of the City Collector and forwarded to the Comptroller of the City of New York, 50 Lafayette Street, New York City.

Very truly yours, Milton Solomon, Deputy Comptroller.

PI/JS.

[fol. 112] DOCUMENT No. 15, ANNEXED TO RESPONDENT'S RETURN

(Letter Dated February 18, 1937, from Felt & Tarrant Mfg. Co. to City Collector; Transmitting Check)

Same as Exhibit "A", annexed to Petition printed herein at side folios 15-16.

DOCUMENT NO. 16, ANNEXED TO RESPONDENT'S RETURN

(Letter, Dated March 2, 1937, from Felt & Tarrant Mfg. Co. to Comptroller)

Same as Exhibit "B," annexed to Petition and printed herein at side folio 17.

DOCUMENT NO. 17, ANNEXED TO RESPONDENT'S RETURN

(Letter, Dated March 2, 1937, from Felt & Tarrant Mfg. Co. to City Collector)

Same as Exhibit "C," annexed to Petition and printed herein at side folio 18.

[fol. 113] DOCUMENT NO. 18, ANNEXED TO RESPONDENT'S RETURN

(Letter, Dated March 4, 1937, from Comptroller to Felt & Tarrant Mfg. Co.)

(Letterhead of The City of New York, Department of Finance, Emergency Revenue Division)

March 4, 1937.

Felt & Tarrant Mfg. Co., 1735 North Paulina Street, Chicago, Illinois.

Attention Mr. G. J. Coupe

GENTLEMEN:

Receipt is acknowledged of your letter dated March 2, 1937, advising of the payment of sales tax and penalties in the sum of $3,122.53, for the period from December 10, 1934, to December 31, 1935, and applying and claiming a refund of said taxes and penalties.

Your letter also advises of your intention to apply for an order of certiorari, directed against Frank J. Taylor, Comptroller of the City of New York, to review his final determination of said taxes and penalties to the Supreme Court of the State of New York.

You are hereby advised that pending a determination by the Court your claim for refund is hereby denied.

Very truly yours, Milton Solomon, Deputy Comptroller.

LG:EK.

[fol. 114] STIPULATION WAIVING CERTIFICATION OF THE RECORD

It is Hereby Stipulated and Agreed, by and between the attorneys for the respective parties hereto, that the foregoing consists of true and correct copies of the order of certiorari and petition and return, with documents annexed thereto, upon which the respondent acted in making the determination sought to be reversed herein and now on file in the Office of the Clerk of the County of New York and certification thereof pursuant to Section 616 of the Civil Practice Act is hereby waived.

Dated, New York, August 16th, 1937.

Newton K. Fox, Attorney for Petitioner. Paul Windels, Corporation Council, Attorney for Respondent.

[fol. 115] IN SUPREME COURT OF NEW YORK, NEW YORK COUNTY

[Title omitted]

NOTICE OF APPEAL TO THE COURT OF APPEALS

SIRS:

Please take notice that the respondent hereby appeals to the Court of Appeals from the order of the Appellate Division of the Supreme Court, First Department, dated the 27th day of May, 1938, and entered in the office of the Clerk of said Appellate Division on or about the 2nd day of June, 1938, sustaining the order of certiorari herein and annulling the determination of the respondent in so far as and to the extent that the tax herein was applicable in the sum of $2,973.98, and the respondent also appeals from the judgment entered thereon in the office of the Clerk of the County of New York on or about the 15th day of June, 1938, in favor of the petitioner for the sum of $3,453.07, and the re-

[fol. 116] spondent appeals from each and every part of said order and judgment as well as from the whole thereof.

Dated, June 29, 1938.

Yours, etc., William C. Chanler, Corporation Counsel; Attorney for Respondent, Office and P. O. Address, Municipal Building, Borough of Manhattan, New York City.

To Newton K. Fox, Esq., Attorney for Petitioner, 42 Broadway, Borough of Manhattan, New York City. Archibald R. Watson, Esq., Clerk of New York County.

[fol. 117] In Supreme Court of New York, Appellate Division

Present: Hon. Francis Martin, Presiding Justice; Hon. James O'Malley, Hon. Edward J. Glennon, Hon. Irwin Untermyer, Hon. Edward S. Dore, Justices.

5468

In the Matter of the Application of Felt & Tarrant Mfg. Co., Petitioner,

For an Order of Certiorari

against

Frank J. Taylor, Comptroller of the City of New York, Respondent

Order—May 27, 1938

The above named petitioner, Felt & Tarrant Mfg. Co., having obtained an order of certiorari dated March 10, 1937, to review the determination of the above named respondent, Frank J. Taylor, Comptroller of the City of New York, in assessing a sales tax deficiency against the petitioner in the sum of $3,122.53, pursuant to Local Law No. 20 of 1934, as [fol. 118] amended by Local Law No. 24 of 1934 of the City of New York, for the period from December 10, 1934, to December 31, 1935, and the said proceeding having been argued by Newton K. Fox, Esq., counsel for petitioner, and Frank J. Derrick, Esq., of counsel for the respondent, and due deliberation having been had thereon; it is hereby ordered and adjudged:

That the order of certiorari be and the same hereby is sustained, and that the determination of the Comptroller, in so far as and to the extent that he held the tax was applicable in the amount of $2,973.98, be and the same hereby is annulled, with $50.00 costs and disbursements to the petitioner, and

Further ordered that the said sum of $2,973.98, with interest from February 19, 1937, be refunded to the petitioner by the Comptroller of the City of New York.

Enter.

F. M.

[fol. 119] IN SUPREME COURT OF NEW YORK, NEW YORK COUNTY

Index No. 5883. Year 1937

In the Matter of the Application of FELT & TARRANT MFG. Co., Petitioner,

For an Order of Certiorari

against

FRANK J. TAYLOR, Comptroller of the City of New York, Respondent

JUDGMENT ENTERED ON ORDER OF THE APPELLATE DIVISION

An order of certiorari to review the determination of the above-named respondent, Frank J. Taylor, in the assessment of an alleged sales tax deficiency against the petitioner in the sum of $3,122.53, pursuant to Local Law No. 20 of 1934, as amended by Local Law No. 24 of 1934 of the City of New York, for the period from December 10, 1934 to December 31, 1935, having been granted on March 10, 1937, by Honorable Charles B. McLaughlin, Justice of the Supreme Court, upon the prayer of the petitioner, Felt & Tarrant Mfg. Co., and the Appellate Division of the Supreme Court of the State of New York, First Department, having considered said petition and order and having entered in the office of the Clerk of said Appellate Division on the 2nd day of June, 1938, an order sustaining the order of certiorari herein and annulling the determination of tax liability by the said Frank J. Taylor in the amount of $2,973.98 and di-

[fol. 120] recting that the said sum of $2,973.98 with interest thereon from February 19, 1937, be refunded to the petitioner together with $50 costs and disbursements of the petitioner; and the remittitur from the said Appellate Division, First Department, having been duly filed in the office of the County Clerk, New York County, on the 8th day of June, 1938, to be proceeded upon according to law; and the disbursements of the petitioner having been duly determined in the sum of $193.94.

Now on reading and filing the remittitur from the Appellate Division, Supreme Court, First Department, and on motion of Newton K. Fox, attorney for petitioner, it is

Ordered and adjudged that the petitioner Felt & Tarrant Mfg. Co., whose address is No. 1735 North Paulina Street, City of Chicago, State of Illinois, recover and that the Comptroller of the City of New York, whose address is the Municipal Building, Borough of Manhattan, City and State of New York, refund and repay to the petitioner forthwith the sum of $2,973.98, with interest thereon at 6 per cent per annum from February 19, 1937, to the date hereof in the sum of $235.15, together with $243.94 costs and disbursements as aforesaid making in all the sum of $3,453.07 with interest thereon at six per cent per annum until paid, and that the petitioner have execution therefor.

Dated, New York, the 15th day of June, 1938.

Archibald R. Watson, Clerk.

[fol. 121] In Supreme Court of New York, Appellate Division

Opinion

[Reported in 254 App. Div. 246]

Glennon, J.:

It is conceded by the petitioner that the tax on certain items amounting to $148.55 was properly levied and consequently, having paid $3,122.53 the full amount assessed, it seeks a refund of the difference amounting to $2,973.98, with interest from February 19, 1937, the date of payment.

The petitioner, Felt & Tarrant Mfg. Co., is an Illinois corporation. It has never qualified to do business in the

State of New York. It has its principal office and place of business in Chicago and is engaged in the business of manufacturing and selling comptometers, adding and calculating machines. The company has no manufacturing plant, warehouse or other depository in the State of New York. All manufacturing is done at Chicago. It maintains an office in New York City for the purpose of soliciting orders for comptometers. This business is done by a principal solicitor and his assistants. The authority of the employees is restricted to the soliciting of orders. The agreement under which they work provides as follows:

"It is Mutually Understood and Agreed."

"1. That the said party of the Second Part is merely a solicitor for orders, and that all orders taken must be submitted to and approved by the Felt & Tarrant Mfg. Co. and that all sales and deliveries shall be made by the Felt & Tarrant Mfg. Co."

[fol. 122] A standard form of order blank is used. The order is addressed to "Felt & Tarrant Mfg. Co." The order blank contains the following statement:

"All orders subject to the acceptance of an officer of the Company in Chicago."

If the order is approved by an officer in Chicago, it is sent to its billing department there. A comptometer is then appropriated to the contract of sale by the shipping department and its serial number is inserted in the upper right hand corner of the order. The machines are then packed in individual cartons for shipment by a common carrier in Illinois, to the purchaser here. The shipping order is then turned over to the billing department, where an invoice is made out for the specific machine. The invoice, which is sent from Chicago to the customer, shows the serial number of the comptometer which was shipped.

The invoice has a statement on its face, "Make all checks payable to Company—remit directly to Chicago." All remittances are received and collections made at the Company's home office. No billings or collections are made in New York City. No comptometers are kept in New York for the purpose of sale. There are some which are used for what is called "repair loans" and demonstration purposes. "Repair loans" refer to machines which are loaned to customers in the event that those purchased directly

become defective and need repair. The servicing of the comptometers is done by the Comptometer Company, a [fol. 123] Delaware corporation, authorized to do business in New York.

It was stated on the argument that the practice employed by petitioner in the conduct of its business was followed for a long period of time prior to the enactment of the New York City sales tax. The petitioner in the sale and shipment of its machines from Chicago to New York is engaged in interstate commerce, and consequently, the municipal authorities have no right to impose a tax upon the receipts.

We can find no fundamental difference in the facts now under review, from those which were before the court in the Matter of National Cash Register Co. v. Frank J. Taylor, etc. (276 N. Y. 208). There Judge Lehman said:

"The power of the State of New York to tax receipts derived from transactions in interstate commerce is limited by the provisions of the Constitution of the United States. * * * The power of the city of New York to tax receipts from sales is conferred upon it by statute (Laws of 1934, Ex. Sess. ch. 873). The power so conferred cannot transcend the limitations imposed upon the power of the State by the Constitution of the United States, and it is restricted further by limitations imposed by the State in the Enabling Act. That act provides expressly that it does not 'authorize the imposition of a tax on any transaction originating and/or consummated outside of the territorial limits of any such city, notwithstanding that some [fol. 124] act be necessarily performed with respect to such transaction within such limits'."

For the reason assigned, the determination of the Comptroller should be annulled with $50 costs and disbursements to the petitioner.

Determination unanimously annulled with $50 costs and disbursements to the petitioner. Settle order on notice. All concur.

Waiver of Certification

It is hereby stipulated that the foregoing are correct copies of the notice of appeal to the Court of Appeals, judgment, order of reversal and opinion of the Appellate Division,

and all papers upon which said judgment order and opinion are founded, all of which are now on file in the office of the Clerk of the County of New York; and certification thereof pursuant to Sections 170 and 577 of the Civil Practice Act or otherwise are hereby waived.

Dated, New York, July 25th, 1938.

William C. Chanler, Corporation Counsel, Attorney for Defendant-Appellant. Newton K. Fox, Attorney for Petitioner-Respondent.

[fol. 125] IN COURT OF APPEALS OF NEW YORK

No. 1116

In the Matter of the Application of FELT & TARRANT MFG. Co., Petitioner-Respondent,

For an Order of Certiorari

against

JOSEPH D. MCGOLDRICK, Comptroller of the City of New York, Defendant-Appellant

NOTICE OF MOTION FOR REARGUMENT, TO AMEND THE OPINION, AND TO AMEND THE REMITTITUR OF THIS COURT

[fol. 126] SIRS:

Please Take Notice that upon the annexed affidavit of William C. Chanler, verified the 28th day of March, 1939, the papers on appeal, and all the proceedings heretofore had herein, the undersigned will move this Court at a session thereof to be held at the Court of Appeals Hall, Albany, New York, on Monday, the 3rd day of April, 1939, at 2 o'clock in the afternoon of that day or as soon thereafter as counsel can be heard, for an order

(a) recalling the remittitur herein;

(b) granting a reargument of the appeal herein, and upon such reargument being granted, reversing the order appealed from;

[fol. 127] (c) or, in the alternative, in the event the order appealed from be not reversed, amending the opinion of

this Court dated November 29, 1938, and the remittitur of this Court dated November 30, 1938, by striking out in each of them the words, "upon the authority of Matter of National Cash Register Co. v. Taylor (276 N. Y. 208)" and by inserting instead in each of them the words, "upon the sole ground that the City sales tax as here applied violates the Commerce Clause (Art. I, sec. 8, cl. 3) of the Constitution of the United States.";

and for such other and further relief as to the Court may seem just and proper.

Dated, New York, N. Y., March 28, 1939.

Yours, etc., William C. Chanler, Corporation Counsel of the City of New York, Attorney for Defendant-Appellant, Office and P. O. Address, Municipal Building, Borough of Manhattan, City of New York.

To Newton K. Fox, Esq., Attorney for Petitioner-Respondent, 42 Broadway, Borough of Manhattan, New York City, N. Y. John Ludden, Esq., Clerk of the Court of Appeals.

[fol. 128] In Court of Appeals of New York

[Title omitted]

Affidavit in Support of Motion for Reargument, etc.

State of New York,
County of New York, ss:

William C. Chanler, being duly sworn, deposes and says:

1. I am Corporation Counsel of the City of New York, and am familiar with the proceedings in this case.

2. The within appeal involved the validity under the Commerce Clause of the Federal Constitution, of Local Law No. 24 of 1934, the New York City sales tax, as applied to respondent's sales in New York City of a standard machine manufactured by it and known as a comptometer.

3. On November 29, 1938, this Court handed down a deci-
[fol. 129] sion which invalidated the City sales tax as applied to those sales. The memorandum opinion (279 N. Y. 678), and the remittitur affirming the order of the Appellate

Division, First Department, stated that the order appealed from was being affirmed "upon the authority of Matter of National Cash Register Co. v. Taylor (276 N. Y. 208)."

4. Reargument of the appeal is requested on the ground that supervening decisions of the United States Supreme Court, including one involving this very taxpayer, require reversal of this Court's decision. On January 30, 1939, the United States Supreme Court sustained a California tax as applied to Felt & Tarrant Mfg. Co., the respondent in the case at bar. The tax there involved is closely similar to the New York City sales tax and was upheld in connection with sales made in substantially the same way as in the present case. Felt & Tarrant Mfg. Co. v. Gallagher, 305 U. S. —, 59 Sup. Ct. 376 (January 30, 1939). Other decisions of the Supreme Court, handed down since this Court's decision in the case at bar, indicate that the City sales tax may be constitutionally applied to the transactions in question. J. Bacon & Sons v. Martin, 305 U. S. —, 59 Sup. Ct. 257 (January 3, 1939); Southern Pacific Company v. Gallagher, 305 U. S. —, 59 Sup. Ct. 389 (January 30, 1939); Pacific Telephone & Telegraph Co. v. Gallagher, 305 U. S. —, 59 Sup. Ct. 396 (January 30, 1939).

5. In the event reargument should be denied, or the original determination adhered to, the appellant desires to apply to the Supreme Court of the United States for a writ of certiorari to review this Court's decision. By order of Mr. Justice Stone dated February 11, 1939, the City's time [fol. 130] to petition the United States Supreme Court for certiorari was extended for a period of sixty days from February 27, 1939. The constitutionality of the City sales tax as applied to sales of this character is obviously of great importance to the City of New York. The present case, and its companion case, Matter of Compagnie Generale Transatlantique v. McGoldrick, in which a similar application is being made to this Court simultaneously herewith, are test cases. A great many proceedings which await the final outcome of these cases are pending before the appellant and in the Courts for hearing and determination. Large numbers of purchasers and sellers, and very considerable sums of money are involved.

6. In the two earlier cases of Matter of National Cash Register Co. v. Taylor, 276 N. Y. 208, certiorari denied, 303 U. S. 656 (March 28, 1938), and Matter of West Publishing

Co. v. Taylor, 276 N. Y. 535, certiorari denied, 303 U. S. 656 (March 28, 1938), it is possible that the denial of certiorari was based upon the Supreme Court's belief that the cases did not present an exclusively federal question. At least one commentator has regarded the Court's denial of certiorari in the National Cash Register case as attributable to the existence of a state question arising under the state enabling act. Lockhart, The Sales Tax in Interstate Commerce, 52 Harvard Law Review 617, 619, note 14 (1939).

7. Because the memorandum opinion and the remittitur in the present case state that the order of the Appellate Division is affirmed upon authority of the National Cash Register case, the Supreme Court might regard the situation presented here as identical with the National Cash Register [fol. 131] case. Accordingly, it might again deny certiorari in the belief that an exclusively federal question was not presented. In point of fact, in the present case the taxpayer did not urge in this Court any objection to the tax other than its invalidity under the Commerce Clause.

8. In order to avoid any doubt on the part of the Supreme Court that the case at bar was decided upon exclusively federal grounds, it is respectfully requested that the memorandum opinion and the remittitur be amended by striking out the words, "upon the authority of Matter of National Cash Register Co. v. Taylor (276 N. Y. 208)", and by inserting in their place the words, "upon the sole ground that the City Sales tax as here applied violates the Commerce Clause (Art. I, sec. 8, cl. 3) of the Constitution of the United States."

Wherefore, your deponent, on behalf of appellant, prays that an order be made granting the relief asked for in the annexed notice of motion.

William C. Chanler.

Sworn to before me this 28th day of March, 1939.
William C. McCutcheon, Notary Public, New York County.

[fol. 132] IN COURT OF APPEALS OF NEW YORK

[Title omitted]

APPELLANT'S MEMORANDUM IN SUPPORT OF MOTION FOR REARGUMENT, ETC.

(1)

While recognizing that an application to this Court for reargument is seldom favored, we have here the unusual situation that a series of supervening decisions by the United States Supreme Court, one of which involves the very Felt & Tarrant Manufacturing Company which is the respondent in this case, require reconsideration by this Court of its previous decision. We refer to Felt & Tarrant Mfg. Co. v. Gallagher, 305 U. S. —, 59 Sup. Ct. 376 (January 30, 1939); Southern Pacific Co. v. Gallagher, 305 U. S. —, 59 Sup. Ct. 389 (January 30, 1939); Pacific Telephone & [fol. 133] Telegraph v. Gallagher, 305 U. S. —, 59 Sup. Ct. 396 (January 30, 1939); and J. Bacon & Sons v. Martin, 305 U. S. —, 59 Sup. Ct. 257 (January 3, 1939). Since the questions involved in the case at bar are questions of federal law, the decisions of the Supreme Court cited above, although subsequent in point of time to the decision in the case at bar, warrant reargument and reversal by this Court of its prior decision. Cf. City of New York v. Goldstein, 299 U. S. 522 (1937), where the Supreme Court granted reargument and reversed its previous determination by reason of a supervening decision of this Court on a point of state law.

The Felt & Tarrant case, supra, involved the liability of the present taxpayer under a California tax law. In that case, sales of comptometers were made by the taxpayers in substantially the same way as the New York City sales in the case at bar. The orders were solicited in California, but were submitted to, approved and accepted by the Felt & Tarrant company at its plant in Illinois, where the comptometers were manufactured. As soon as an order was accepted, a particular machine was appropriated for that purpose in the Felt & Tarrant company's shipping department in Illinois. Delivery was made by shipping the machines across state lines into California. At times the machines were forwarded directly to the purchasers; in other instances they were shipped to the vendor's California agent who then pro-

ceeded to make delivery. Invoices were sent out from the Illinois plant, and payment was made there. The Felt & Tarrant Company had not even qualified to do business in California.

The tax involved was the California "use" tax (Cal. Stat., [fol. 134] 1935, ch. 361, as amended by Cal. Stat., 1937, chs. 401, 671 and 683), which in every material particular parallels the New York City sales tax. The identity of the two taxes in all essentials is indicated by the following tabulation:

California Tax	City Tax
1. The tax is imposed on the purchaser at retail of merchandise purchased for consumption and not for resale.	1. The tax is imposed on the purchaser at retail of merchandise purchased for consumption and not for resale.
2. The tax is a given percentage of the sales price.	2. The tax is a given percentage of the sales price.
3. The tax is paid by the purchaser at the time of the sale.	3. The tax is paid by the purchaser at the time of the sale.
4. The tax is collected by the vendor, who files the returns.	4. The tax is collected by the vendor, who files the returns.
5. If the tax is not collected by the vendor, it is payable directly by the purchaser to the taxing official.	5. If the tax is not collected by the vendor, it is payable directly by the purchaser to the taxing official.
6. The tax is on a local event, i. e., "the exercise of any right or power * * * incident to the ownership of that property" other than resale.	6. The tax is on a local event, i. e., the "transfer of title or possession or both" for any purpose other than resale.

The fact that the California tax is termed a "use" tax, and the New York City tax a "sales" tax is a mere difference in words, not a difference in substance. "Use" in the California statute does not have its ordinary dictionary sense, but a special statutory sense which is designed to cover the exercise of any act of dominion over

property purchased. Through a special statutory definition [fol. 135] of terms, the California "use" tax effects a tax on purchases, as the foregoing tabulation plainly shows. Under the statute, the term "use" means "the exercise of any right or power over tangible personal property incident to the ownership of that property." In other words, when a purchaser receives title and possession of property for use rather than resale, he is "using" it within the meaning of the California statute. Southern Pacific Co. v. Gallagher, supra; Pacific Telephone & Telegraph Co. v. Gallagher, supra. Similarly, under the New York City tax, when a purchaser receives title and possession of property for use rather than resale, he is purchasing it at retail within the meaning of the City tax.

Under the California statute, no effort is made to tax the actual use of the articles purchased. The purpose is to tax the purchase, and nothing more. In essence, therefore, the transactions and activities taxed by the California tax are the same as those taxed by the New York City tax. The fact that one is called a "use" tax and the other a "sales" tax affords no basis for varying constitutional treatment. As stated by the Supreme Court in Southern Pacific Company v. Gallagher, supra, 305 U. S. —, 59 Sup. Ct. 389, 394:

"State taxes upon national commerce or its incidents do not depend for their validity *upon a choice of words* but upon the choice of the thing taxed." (Italics ours.)

It might be claimed that the California tax does not apply where the goods purchased are to be consumed solely outside the state. However, the New York City sales tax does not apply where the goods, although purchased in New [fol. 136] York City, are to be delivered outside of the City. Article 94 of the Comptroller's Regulations; Matter of C. G. Gunther's Sons v. McGoldrick, 279 N. Y. 148 (1938). Furthermore, this possible difference between the California tax and the New York City tax is irrelevant to the present case since there is no evidence in the record that any machine sold by the taxpayer was used outside of New York City. This taxpayer cannot invoke distinctions which might arise by reason of use outside the City, since here there is no claim or showing that the comptometers sold were used anywhere but in the City of New York. Obviously, respond-

ent is not the champion of any cause but its own. Henneford v. Silas Mason Co., 300 U. S. 577, 583 (1937). Moreover, this feature of the California tax is of no importance in determining its constitutionality, for the statute would have been valid without that limitation, it being well settled that a tax may be imposed upon goods imported into the state for use outside the state. Nashville, C. & St. L. Railway Co. v. Wallace, 288 U. S. 249 (1933); Edelman v. Boeing Air Transp., 289 U. S. 249 (1933).

The foregoing discussion has demonstrated the substantial identity of the California use tax and the City sales tax as applied to the transactions of the respondent. Accordingly, the decision of the Supreme Court sustaining the California tax on the Felt & Tarrant Company is a square authority for upholding the tax at bar.

Accord:

Southern Pacific Co. v. Gallagher, supra;
Pacific Telephone & Telegraph Co. v. Gallagher, supra.

[fol. 137] (2)

The constitutionality of the tax at bar is further demonstrated by the recent decision of the Supreme Court in J. Bacon & Sons v. Martin, supra. In that case the Court sustained a Kentucky tax on "the receipt of cosmetics in the state by any Kentucky retailer", as applied to articles purchased in other states and shipped into Kentucky to the retailer. The Court dismissed the taxpayer's appeal in a per curiam opinion, holding that the validity of the tax was so clear as not even to raise a substantial federal question. The Court thus held taxable the receipt by a retailer of cosmetics " 'when the articles are in his possession and when the merchant has unlimited control and dominion over the cosmetics' Martin v. J. Bacon & Sons, 268 Ky. 612, 105 S. W. (2d) 569, 572", despite the fact that the goods were shipped across state lines. Since a tax upon the receipt of merchandise shipped across state lines is constitutional, we believe that the New York City tax on the acquisition by purchase of merchandise shipped across state lines is likewise constitutional.

We submit that the decisions of the United States Supreme Court rendered subsequent to this Court's decision demonstrate that under the law as now determined by the

highest court, the City sales tax is valid and constitutional as applied in the case at bar.

(3)

In the event the order appealed from be not reversed, appellant seeks amendment of the opinion and remittitur so as to indicate clearly that the case was decided by this Court on exclusively federal grounds. The opinion and re-
[fol. 138] mittitur now state that the order appealed from was affirmed "upon the authority of National Cash Register Co. v. Taylor (276 N. Y. 208)". We do not believe that this Court intended to decide the case at bar on other than exclusively federal grounds. However, since in the National Cash Register case some question has arisen as to whether this Court decided the case in such a way as to present an exclusively federal question, and since doubt on that point may well have been the basis for the Supreme Court's denial of certiorari, in the case at bar we request that every possibility of doubt be removed by an amendment of the opinion and the remittitur.

Conclusion

We desire to stress the importance of inserting in the remittitur an indication that the federal question under the Commerce Clause was the sole ground for the decision against the validity of the tax. The objection to inserting the word "sole" which was present in Central Savings Bank v. City of New York, 280 N. Y. 9 (Feb. 21, 1939), is not present here. That case involved the construction of the due process clause, and the identity of phrasing between N. Y. Const., Art. I, § 6 and U. S. Const. XIV Amendment, precluded the use of the word "sole". In the instant case, no question as regards the Commerce Clause could arise under any but the U. S. Constitution.

The standard formula used where a litigant desires to appeal to the Supreme Court of the United States from a decision of this Court denying a federal right, is not pertinent to the instant case, where the federal right has not
[fol. 139] been denied but has, according to the contention of the party seeking a further review, been construed too generously in favor of the person asserting it.

The motion for reargument should be granted, and upon such reargument, the order appealed from reversed; or in

the alternative the remittitur should be amended to show that the decision raised a federal question under the Commerce Clause and no other questions.

March 28, 1939.

Respectfully submitted, William C. Chanler, Corporation Counsel, Attorney for Appellant. William C. Chanler, Sol Charles Levine, Jerome R. Hellerstein, of Counsel.

[fol. 140] Clerk's certificate to opinion omitted in printing.

[fol. 141] In Court of Appeals of New York

In the Matter of the Application of Felt & Tarrant Mfg. Co., Petitioner-Respondent,

for an order

against

Joseph D. McGoldrick, as Comptroller of the City of New York, Defendant-Appellant

Order affirmed, with costs, upon the authority of Matter of National Cash Register Co. v. Taylor (276 N. Y., 208). No opinion.

Concur: Crane, Ch. J., Lehman, O'Brien, Hubbs, Loughran, Finch and Rippey, JJ.

[fol. 142] Clerk's certificate to remittitur and orders omitted in printing.

[fol. 143] In Court of Appeals of New York

State of New York, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 29th day of November, in the year of our Lord one thousand nine hundred and thirty-eight, before the Judges of said Court.

Witness, the Hon. Frederick E. Crane, Chief Judge, Presiding. John Ludden, Clerk.

REMITTITUR—November 30, 1938

[fol. 144] In the Matter of the Application of FELT & TARRANT MFG. Co. for an Order of Certiorari vs. JOSEPH D. McGOLDRICK, Comptroller of the City of New York.

Be it Remembered, That on the 10th day of September, in the year of our Lord one thousand nine hundred and thirty-eight, Joseph D. McGoldrick, Comptroller of the City of New York, the appellant in this cause, came here unto the Court of Appeals, by William C. Chanler, his attorney, and filed in the said Court a Notice of Appeal and return thereto from the Order and Judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Felt & Tarrant Mfg. Co., the respondent in said cause, afterwards appeared in said Court of Appeals by Newton K. Fox, its attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 145] Whereupon, The said Court of Appeals having heard this cause argued by Mr. William C. Chanler, of counsel for the appellant, and by Mr. Newton K. Fox, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs upon authority of Matter of National Cash Register Co. v. Taylor (276 N. Y. 208).

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

[fol. 146] And afterwards, to wit, on the 11th day of April, 1939, an order was duly made amending the remittitur herein, a certified copy of which order is hereto attached and made a part hereof.

Therefore, it is considered that the said order be affirmed with costs, &c., &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be

enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS

Clerk's Office

Albany, November 30, 1938.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal.)

[fol. 147] IN COURT OF APPEALS OF NEW YORK

[Title omitted]

ORDER DENYING MOTION FOR REARGUMENT, ETC.—April 11, 1939

A motion for a reargument of the above cause having been heretofore made upon the part of the above named appellant herein and papers having been duly submitted thereon and due deliberation thereupon had, it is

Ordered, that the said motion be and the same hereby is denied.

The remittitur, however, is hereby amended by adding thereto after the words "upon the authority of Matter of National Cash Register Co. v. Taylor (276 N. Y. 208)" the following: "and upon the sole ground that the City Sales Tax Law as here applied violates the commerce clause (Article 1, Section 8, Clause 3) of the Constitution of the United States."

And, the Supreme Court, New York County, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy.

Rufus Kimball, Deputy Clerk. (Seal.)

[fol. 148] IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK

ORDER ON REMITTITUR FROM THE COURT OF APPEALS—December 12, 1938

The above named respondent having appealed to the Court of Appeals of the State of New York, by Notice of Appeal filed in said Court on the 10th day of September, 1938, from the order dated the 27th day of May, 1938, of the Appellate Division of the Supreme Court, in and for the First Judicial Department, which said order was duly entered and filed in the Office of the Clerk of said Appellate Division on the 2nd day of June, 1938, and said order together with the remittitur from the said Appellate Division was duly filed in the Office of the County Clerk, New York County, on the 8th day of June, 1938, to be proceeded upon according to law, wherein and whereby it was adjudged that [fol. 149] the Order of Certiorari herein signed by the Honorable Charles B. McLaughlin on the 10th day of March, 1937, and duly filed in the Office of the Clerk of New York County on the 10th day of March, 1937, be sustained, and that the determination of the Comptroller of the City of New York in so far and to the extent that the New York City sales tax was held applicable to the petitioner in the sum of $2,973.98 be annulled and that the respondent refund to the petitioner the sum of $2,973.98 with interest thereon at 6 per cent per annum from February 19, 1937, and pay to the petitioner the sum of $50 costs and disbursements of such proceedings; and the respondent having on the 10th day of September, 1938, further appealed to the said Court of Appeals from the judgment entered herein in favor of the petitioner and against the respondent for the sum of $3,453.07 with interest thereon at 6 per cent per annum until paid, which said judgment was duly entered and docketed on the 15th day of June, 1938, in the Office of the Clerk of the County of New York; and the said appeal having been duly argued in the said Court of Appeals, and, after due deliberation, the Court of Appeals having ordered and adjudged that the aforesaid order of the Appellate Division of the Supreme Court, First Judicial Department, and the aforesaid judgment be affirmed, with costs in the said Court of Appeals, and having further ordered that the record and the proceedings in said Court of Appeals be re-

mitted to the Supreme Court, New York County, there to be proceeded upon according to law,

Now on reading and filing the remittitur from the Court of Appeals herein and upon motion of Newton K. Fox, Esq., attorney for petitioner, it is

Ordered that the said order of the Court of Appeals be and the same hereby is made the order of this Court; and it is

[fol. 150] Further Ordered that the order of the Appellate Division and the judgment entered herein be and the same hereby are affirmed; and it is

Further Ordered that judgment be entered in favor of the petitioner and against the Comptroller of the City of New York for the costs and disbursements of petitioner in the proceedings on said appeal to the Court of Appeals.

Enter.

W. H. B., J. S. C.

[fol. 151] SUPREME COURT, NEW YORK COUNTY

In the Matter of the Appilcation of FELT & TARRANT MFG. Co., Petitioner,

For an Order of Certiorari

against

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, Respondent

JUDGMENT

An order having been entered herein on the 12th day of December, 1938, by the Hon. William Harmon Black, Justice of the Supreme Court, on the order and the remittitur dated the 30th day of November, 1938, of the Court of Appeals of the State of New York, making the order of the said Court of Appeals the order of this Court.

Now on motion of Newton K. Fox, Esq., attorney for petitioner, it is

Ordered and Adjudged that the petitioner, Felt & Tarrant Mfg. Co., whose address is No. 1735 North Paulina Street, City of Chicago, State of Illinois; recover of and from Joseph D. McGoldrick, the Comptroller of the City of New York, whose address is the Municipal Building,

Borough of Manhattan, City and State of New York, the sum of $158.80 costs as taxed on said appeal to the Court of Appeals and that the petitioner have execution therefor.

Dated, New York, N. Y., December 15, 1938.

Archibald R. Watson, Clerk.

[fol. 152] Clerk's certificate to order omitted in printing.

[fol. 153] In Supreme Court of New York, County of New York

[Title omitted]

Order—April 26, 1939

The defendant-appellant having moved at the Court of Appeals for reargument of the appeal in the above proceeding and the Court of Appeals in an order dated the 11th day of April, 1939, and entered in the office of the Clerk of said Court on or about the same day having denied the motion but amended its remittitur, dated the 29th day of November, 1938 herein by adding thereto after the words "be and the same hereby is affirmed with costs" the following: "upon the sole ground that the City Sales Tax Law as here applied violates the Commerce Clause (Article 1, Section 8, Clause 3) of the Constitution of the United States",

Now upon reading a certified copy of said order of the Court of Appeals and upon filing the remittitur amended [fol. 154] as aforesaid, it is

Ordered that the said order of the Court of Appeals, dated the 11th day of April 1939, be and the same hereby is made the order of this Court.

Enter.

A. F., J. S. C.

[fol. 155] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 156] SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME WITHIN WHICH TO APPLY FOR WRITS OF CERTIORARI

On consideration of the motions of counsel for petitioner in the above-entitled causes, and good cause therefore having been shown.

It is Now Here Ordered that the time within which petitions for writs of certiorari may be filed herein be, and the same is hereby, extended for a period of 60 days from February 27th, 1939.

(Signed) Harlan F. Stone, Associate Justice of the Supreme Court of the United States.

Dated, this 11th day of February, 1939.

[fol. 157] SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME WITHIN WHICH TO APPLY FOR WRITS OF CERTIORARI

On consideration of the motions of counsel for petitioner in the above-entitled causes, and good cause therefor having been shown,

It is Now Here Ordered that the time within which petitions for writs of certiorari may be filed herein be, and the same is hereby, extended for a period of 60 days from March 15, 1939.

(Signed) Harlan F. Stone, Associate Justice of the Supreme Court of the United States.

Dated, this 19th day of April, 1939.

[fol. 158] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 5, 1939

The petition herein for a writ of certiorari to the Supreme Court of the State of New York is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

(26953)

Supreme Court, U. S.
FILED
MAY 8 1939
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

No. 45 OCTOBER TERM, 1938

JOSEPH D. McGOLDRICK, Comptroller of the City of New York,
Petitioner,

against

FELT & TARRANT MFG. CO.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, AND BRIEF IN SUPPORT THEREOF

Application of Commerce Clause to consumers' sales tax on sales in New York City of merchandise shipped from sources of supply outside the State. Error of holding that tax is invalid where non-discriminatory, and possibility of multiple taxation is absent. Error of holding that sales made in city are in interstate commerce merely because seller for its own convenience chooses to ship from outside the State. Holding of court below (1) discriminates against local business by giving unfair competitive advantage to sellers storing merchandise outside the State; and (2) seriously diminishes local tax revenues by creating extensive immunities and fostering tax avoidance and evasion. Conflict between decisions of state courts.

May 3, 1939.

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SUPREME COURT OF THE UNITED STATES

No. : October Term, 1938

Joseph D. McGoldrick, Comptroller of the City of New York,
Petitioner,
against
Felt & Tarrant Mfg. Co.

Petition for Writ of Certiorari to Supreme Court of the State of New York

To the Honorable the Supreme Court of the United States:

The petition of Joseph D. McGoldrick, Comptroller of the City of New York, respectfully shows:

1. Your petitioner is the Comptroller of the City of New York, charged by law with the duty of enforcing the tax laws here involved. In conformity with the law in New York, your petitioner was duly substituted, prior to the decision of the Court of Appeals sought to be reviewed, in place and stead of Frank J. Taylor, the former Comptroller, who made the original determination of tax liability against the taxpayer. The petition seeks review of a decision of the Court of Appeals of the State of New York holding that, by virtue of the Commerce Clause, the New York City sales tax could not be imposed upon respondent's sales of comptometer adding machines

to New York City purchasers. The federal question was, and the Court so stated in its remittitur, the sole question involved in its decision.

2. The present case is a companion case to *Matter of Compagnie Generale Transatlantique* v. *McGoldrick*, 279 N. Y. 192, decided on the same date, where the tax was likewise invalidated. A petition for certiorari in that case is being presented together with the present petition. On the same date was also decided *Matter of Sears, Roebuck & Co.* v. *McGoldrick*, 279 N. Y. 184, rearg. den. 280 N. Y. mem. p. 76, in which case, however, the tax was upheld as not violative of the Commerce Clause.

Jurisdiction and Timeliness

3. The petition for certiorari is made under 28 U.S.C.A., §344, subd. (b); the Court has jurisdiction to grant the writ. *Minnesota* v. *Blasius*, 290 U. S. 1 (1933); *Milk Control Board* v. *Eisenberg Farm Products*, 306 U. S. , 59 S. Ct. 528 (1939).

4. A final order and judgment were entered in the office of the County Clerk of New York County, on December 15, 1938, upon the remittitur of the Court of Appeals filed on December 12, 1938, and upon the order of the Supreme Court of the State of New York, dated December 12, 1938, making the order and judgment of the Court of Appeals the order of the Supreme Court. Thereafter, by order of Mr. Justice STONE, dated February 11, 1939, the petitioner's time to petition this Court for certiorari was extended for a period of sixty days from February 27, 1939; and, by order of Mr. Justice STONE, dated April 19, 1939, such time was again extended for a period

of sixty days from March 15, 1939, which latter date was within three months of the original entry of the final order and judgment on December 15, 1938. On April 3, 1939, petitioner duly filed with the Court of Appeals a motion for reargument and to amend the remittitur. On April 11, 1939, the Court of Appeals denied the motion for reargument but granted the motion to amend. On April 26, 1939, an order was entered in the office of the County Clerk of New York County, making the order of the Court of Appeals dated April 11, 1939, the order of the Supreme Court of the State of New York. The petition is timely, either by virtue of Mr. Justice STONE's orders of extension, or because of the decision on the motion for reargument, the amendment of the remittitur on April 11, 1939, and the resultant necessity of entering new orders in the Court where the record lies.

5. The decision of the Court of Appeals was based solely upon the ground that the tax as applied violated the Commerce Clause of the Federal Constitution. This ground of objection to the tax was raised by the taxpayer (respondent here) at the hearing before the petitioner to review petitioner's preliminary determination of tax liability (R. 39). Thereafter, it was again raised in the proceeding brought in the Appellate Division under Article 78 of the Civil Practice Act of the State of New York (R. 11-12). The Appellate Division sustained the objection and annulled petitioner's determination (R. 121-124). Upon further appeal to the Court of Appeals, it was the sole objection urged by the taxpayer in the Court of Appeals. The remittitur, as amended, provides that the order of the Appellate Division appealed from was affirmed,

"upon the sole ground that the City Sales Tax Law as here applied violates the Commerce Clause (Art. I, Sec. 8, Clause 3) of the Constitution of the United States." (280 N. Y. mem. p. .)

The Statute the Validity of Which Is Involved

6. The statute the constitutionality of which is involved is the New York City sales tax law, Local Law No. 20 of 1934 (officially printed at p. 143 of Local Laws of the Cities of the State for 1934 as No. 21), as amended by Local Law No. 24 of 1934 (officially printed at p. 164 as No. 25), and by Local Law No. 23 of 1935 (p. 138), all enacted pursuant to authority conferred by Laws of New York of 1934, ch. 873, p. 1805. These local laws, and the enabling act authorizing them, have been and continue to be renewed annually. The provisions of the local law are printed as Appendix A, the provisions of the state enabling act, as Appendix B.

Opinions Below

7. The memorandum opinion of the Court of Appeals is reported in 279 N. Y. 678, the opinion of the Appellate Division in 254 App. Div. 246. The opinions of the Court of Appeals in the companion *Compagnie Generale Transatlantique* case is in 279 N. Y. 192, which affirmed 254 App. Div. 237. The opinion of the Court of Appeals in *Matter of Sears, Roebuck & Co.* v. *McGoldrick,* decided on the same day but sustaining the tax, is reported in 279 N. Y. 184, rearg. den. 280 N. Y. mem. page 76, the memorandum opinion of the Appellate Division in 254 App. Div. 669. Copies of the opinions of the Court of Appeals in the three cases and of the Appellate Division in this case are attached hereto as Appendix C.

Summary Statement of the Matter Involved

8. The City sales tax law in question imposes a nondiscriminatory tax of 2% upon every sale of tangible personal property in the City of New York, the tax being paid and borne by the purchaser. A sale is defined as "any transfer of title or possession or both"; a retail sale as a sale "for any purpose other than for resale". The respondent's sales which were the subject of the tax were made in a manner described more fully in the subjoined brief. The sales orders were procured in New York City and called for the sale and delivery there of standard items of equipment—comptometer adding machines—sold from standard price lists and not made up specially to fill a particular order. Respondent had extensive storage facilities at its New York City place of business where it made a practice of testing and overhauling the machines after receipt from its Chicago plant and before delivery to the customer. However, it chose not to utilize these storage facilities but instead, drew the machines to fill the orders from its Chicago stock.

Questions Presented.

9. The questions presented in the case are as follows:

(a) Does the New York City tax as applied to respondent's sales of comptometers impose an unconstitutional burden on interstate commerce?

(b) Do respondent's sales of comptometers "require or necessarily involve transportation across the state boundary" in the sense in which those words were used in *Wiloil Corp.* v. *Pennsylvania*, 294 U. S. 169, 174 (1935)?

Assignment of Errors

10. It is submitted that the Court of Appeals erred:

(a) In holding that the New York City sales tax as applied to the respondent's sales constituted an unconstitutional burden on interstate commerce.

(b) In holding that the sales which were the subject of the tax were contracts for interstate shipments, or otherwise required or necessarily involved interstate commerce, giving in so holding an erroneous interpretation of the *Wiloil* case, *supra*.

(c) In regarding itself as compelled by the Commerce Clause to affirm the determination of the Appellate Division, and annul petitioner's determination of tax liability.

Reasons for Allowance of the Writ

11. The reasons relied on by petitioner for allowance of the writ are as follows:

(*a*) Petitioner contends that in holding that the City sales tax law as applied to respondent's sales constitutes an unconstitutional burden on interstate commerce the Court of Appeals has decided a federal question of substance in a way probably not in accord with the applicable decisions of this Court, which we cite in the subjoined brief; for, the Court has held invalid a type of local consumers' tax which (*i*) does not discriminate against or otherwise burden interstate commerce, and (*ii*) is so limited in its operation that there is no possibility of multiple taxation.

(*b*) Petitioner suggests that in holding that the particular transactions taxed required or necessarily involved interstate commerce, the Court of Appeals has decided a second federal question of substance in a way probably not in accord with applicable decisions of this Court. *Wiloil Corporation* v. *Pennsylvania,* 294 U. S. 169 (1935), and *Banker Brothers* v. *Pennsylvania,* 222 U. S. 210 (1911).

(*c*) These are test cases. A great many proceedings are pending which await their final outcome. Large numbers of purchasers and sellers and sums of money running into millions of dollars annually are involved. In New York City, in particular, a huge business is done every year in a manner similar to that here described, for a large number of purchasers in the City of New York place orders which, by reason of the seller's own choice or convenience, are filled from out-of-state sources.

(*d*) The decision of the Court of Appeals unduly limits the taxing power of the States, and does so in such a way as to give industries a motive for moving their plants or warehouses out of the State while maintaining selling offices within the State. By thus causing a loss of wealth and employment to the State, it will bring about a shrinkage of revenue from other taxes.

The Commerce Clause should not be twisted into a device to prejudice local vendors by subjecting them to unjustifiable competitive disadvantages in their appeal to the same local market. A considerable number of states and localities are imposing consumers' taxes like the New York City sales tax here involved, and are undoubtedly confronted with precisely the same question under the Commerce Clause.

(*e*) The decision of the Court of Appeals that respondent's sales taxed are in interstate commerce, conflicts with the decision of the highest court of the State of West Virginia where a similar question was raised and decided. *Lewis* v. *City of Bluefield*, 117 W. Va. 782, 188 S. E. 237 (1936).

WHEREFORE, petitioner prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Supreme Court of the State of New York, in and for the County of New York, commanding that Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Court in this cause, to the end that the case may be reviewed and determined in this Court, as provided in 28 U.S.C.A., §344, subd. (b); and that the final order and judgment of the said Court, and every part thereof, may be reviewed and corrected by this Court in conformity with the Constitution and laws of the United States; and that the said final order and judgment may be reversed and petitioner's original determination of tax liability on the part of the respondent confirmed; and petitioner prays for such other and further relief as to this Court may seem just and proper; and petitioner will ever pray.

Dated: New York, N. Y., May 3, 1939.

JOSEPH D. MCGOLDRICK,
Comptroller of the City of New York,
Petitioner,

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SUPREME COURT OF THE UNITED STATES

No. . October Term, 1938

Joseph D. McGoldrick, Comptroller of the City of New York,
Petitioner,
against
Felt & Tarrant Mfg. Co.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Statement of the Case

The respondent is an Illinois corporation engaged in the business of manufacturing and selling comptometer adding and calculating machines (R. 39-40). Its factory and main office are in Chicago. Together with the Comptometer Company, its wholly owned subsidiary and agent, it maintains a place of business in New York City (R. 74, 64-66), and sells, rents, repairs, and services comptometers and parts of comptometers (R. 101).

There is no dispute as to the taxability of any of these activities except the sales of fully equipped comptometer machines by the respondent to business offices in the New York City market (R. 39-40). As to these, the main fact relied on is that, although the immediate source of the machines is the New York City stockroom, their original source is the Company's Illinois factory (R. 58).

The Company has extensive storage facilities in New York City. It always has on hand there between 250 and 300 comptometers in standard sizes,—an amount sufficient to fill orders for six months if the machines were new (R. 66-67, 75, 85, 108). These it testified were used solely for loans to customers pending arrival of new machines from Chicago, or pending repairs (R. 67-68). Despite these ample storage facilities, respondent chooses to fill its orders from Chicago stock.

Comptometers are not specially built or manufactured to fill a particular order (R. 49-50, 56, 66). They are of only two general types: hand driven and electrically operated, and they come in only four sizes (R. 66-67).

The sales in dispute are made in the following manner:

The orders taken by New York salesmen are sent by the New York office to Chicago (R. 55-56). Although these orders are first mailed or brought to the New York office, they must, at the respondent's insistence, be nominally addressed to Chicago (*ibid.*). But it is only after they have been noted and entered in New York City that the New York office sends them to Chicago (R. 43, 56). There is no evidence that the customer knows either that the order is to be sent to Chicago, or that the machines will come from there.

Order forms contain a printed statement that they are subject to confirmation in Chicago (Taxpayer's Exhibit 1, pp. 75-76). These forms contain no space for the indication of such confirmation (*ibid.*). There is no evidence that the customer is ever informed that his order has or has not been confirmed. There is no evidence that the Chicago office ever fails to confirm an order. Prices are fixed, not in Chicago, but in New York on the basis of a standard price list (R. 57). The New York office fixes the

trade-in value of old machines (R. 82). The machine sold is not specially built, but is a stock product (R. 66-67). The requirement of Chicago confirmation serves no purpose other than to check inaccuracies in price quoting and to allow for additional credit checking (R. 57).

The Company packs the machine in a carton and ships it—not to the customer—but to itself at New York (R. 58). The customer is not concerned at all with this delivery, is not the consignee, is not covered by the insurance, and of course, does not pay the freight (R. 70-71). The Company has no choice but to ship directly to its New York place of business rather than to the customer, because the machine on its arrival here is not in a deliverable state (R. 58-59). There is "a great deal of breakage" in transit which must be repaired in the New York workroom (*ibid.*). In addition, testing, overhauling and adjusting must be done here (R. 65, 71). These activities may take three or four days, and it is not until they are completed that the New York office can make delivery to the customer (R. 68).

The Company's obligation does not cease with its testing and overhauling of the machine in New York. Each contract of sale requires it, as an essential part thereof,

> "to keep the above Comptometer while in possession of (name of customer) in complete repair for one year from date free of all charge for repairs" (R. 76, 50-51).

In this connection, respondent once a month for a full year after purchase renders a complete service of "inspection, oiling, cleaning" (R. 51-52, 66). Repairs are made and parts installed free of charge in the New York headquarters (R. 60, 65, 72-73, 76). While the machine is

being repaired, the respondent supplies without charge a substitute machine from its New York stock (R. 69-70, 72). This substitute machine, a replica of the one under repair, may be retained by the customer 30 days, more or less (R. 69).

During the first half of the tax period in question, the respondent carried on this work of servicing, overhauling and repairing directly, and employed a staff of mechanics and technicians for this purpose (Documents Nos. 1-3 of Comptroller's return, R. 101). In the second half of the period, the respondent organized a wholly-owned subsidiary, the Comptometer Company, which thereafter carried on this work (R. 87, 73, 29).

Although the respondent concedes that it makes considerable local rentals and sales of parts, which are taxable, it has never fulfilled the requirement of state law that it qualify to do business within the State (R. 87). In the middle of 1935, its subsidiary, the Comptometer Company, received such authority (*ibid.*). But, both before and after the appearance on the scene of the Comptometer Company, the respondent engaged directly, and on its own account, in concededly taxable local transactions (R. 301-303).

The City sales tax imposed upon these sales is a general non-discriminatory tax of 2% upon every "transfer of title or possession or both", in the City of New York, of tangible personal property purchased for consumption and not for resale. The tax is paid by the purchaser. It is ordinarily collected by the vendor, but if not, is payable by the purchaser directly to the petitioner as City Comptroller. As a matter of state law, the tax does not apply where goods, although purchased in New York City, are to be delivered to consumers outside the City. Article 94 of the Comptroller's Regulations; *Matter of C. G. Gun-*

ther's Sons v. *McGoldrick*, 279 N. Y. 148 (1938). No license is required of either purchaser or vendor as a condition of making the sale.

Jurisdictional Statement and Assignment of Errors

The Court will find these at pages 2 and 6 of the petition, *supra*, respectively.

POINT I

The New York City sales tax, as applied to the respondent's sales, does not impose an invalid burden on interstate commerce.

The question is whether the tax as applied to respondent's sales imposes a direct and immediate burden on interstate commerce. Such burden, to be the basis for invalidation, would have to be actual and not merely theoretical. The main types of applicable situations in which an unconstitutional burden has been found to be present were recently summarized in *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434 (1939). It is settled by that and other leading cases on the subject that where a tax is nondiscriminatory, and where it does not impose unwarranted licensing requirements, it will be upheld provided there is no possibility of multiple taxation. *Western Live Stock* v. *Bureau*, 303 U. S. 250 (1938); *J. D. Adams Mfg. Co.* v. *Storen*, 304 U. S. 307 (1938); *Coverdale* v. *Arkansas-Louisiana Pipeline Co.*, 303 U. S. 604 (1938); *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434 (1939).

Measured by these standards, the tax at bar is clearly valid:

There is no undue burden on interstate commerce.

1. Purchasers from foreign vendors are required to pay the same tax as purchasers from local vendors, and no more. Foreign vendors are placed under the same obligation with respect to collecting the tax as local vendors. Foreign products are not discriminated against. On the other hand, local vendors, local products and local business would be discriminated against were the tax at bar to be held invalid.

2. Interstate commerce is not interfered with by the imposition of unwarranted licensing requirements, conditions precedent to interstate selling, and the like. No license is required of purchasers or vendors. If the purchaser omits to pay the tax, he is not forbidden to make the purchase; the purchase takes place just the same.

3. In the case at bar there is no possibility of multiple taxation. The tax is not one on the gross receipts of a vendor imposed by the vendor's State; it is on the purchases of a local consumer. The tax is upon the purely local acquisition of property in the local market.

With respect to analogous taxes on consumers, the Court has already held that the state in which the consumer is may tax him. Thus, it has sustained the following consumer's taxes imposed by the buyer's state, viz.: a motor fuel (sales) tax (*Wiloil Corporation* v. *Pennsylvania*, 294 U. S. 169 [1933]), a use (sales) tax (*Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86 [1934]), a "receiving" (sales) tax (*J. Bacon & Sons* v. *Martin*, 305 U. S. 380 [1939]), or a property (sales) tax (*Hinson* v. *Lott*, 8 Wall. 148 [1868]). On the other hand, the Court has

barred similar taxes imposed by the seller's state (*J. D. Adams Mfg. Co.* v. *Storen*, 304 U. S. 307 [1938]; *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434 [1939]). Since the tax on the sales at bar is imposed by the *purchaser's* State and the tax could not be imposed on the same sales by the *seller's* State, there is no possibility of double or multiple taxation.

Since there is no possibility of multiple taxation, there is no necessity for allocation, assuming allocation to be administratively feasible in respect of a tax on a purchaser-consumer. The fact that multiple taxation is not possible itself results in a species of allocation: New York City taxes New York City purchasers on their purchases in that City, and Illinois taxes Illinois purchasers on their purchases there. Illinois could not claim the right to tax the purchasers of these comptometers on their acquisition of property in New York City, any more than New York City could tax an Illinois purchaser on his acquisition of property in Illinois. The doctrine of extraterritoriality as well as that of multiple taxation would forbid such a result.

4. The decisions of this Court have never gone so far as to say that a company doing some interstate business may not, when it enters a foreign state, be compelled to assume the burden, borne by domestic sellers, of collecting from its customers and transmitting to the authorities a sales tax imposed upon such customers by local law. *Cf. Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86 (1934); *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 305 U. S. , 59 Sup. Ct. 376 (1939). Otherwise, foreign vendors would obtain unjustifiable advantages over local competitors

who are required to collect the 2% tax. Business would be encouraged to flee the taxing state and seek a point of vantage in neighboring states from which to make the identical sales free of tax. Thus, new forms of tax avoidance and evasion would be fostered. There is no sound reason why respondent should be permitted to escape the sales tax merely because it fills its orders from Chicago stock instead of utilizing its adequate storage facilities in New York City.

Comparable taxes have always been upheld.

So far as we are aware, this is the first case presented to this Court in which it has been urged that a retail sales tax levied upon a purchaser-consumer imposes an invalid burden on interstate commerce. This Court has never held such a tax upon the purchaser invalid.

Moreover, so far as we know, this Court has never held invalid a tax imposed by the buyer's state upon interstate sales measured by the value or volume of the sales. See, in this connection, the scholarly analysis of the cases in LOCKHART, *The Sales Tax in Interstate Commerce*, 52 Harvard Law Review 617, 629 (1939).

In every case where this Court has had before it a tax to which the City sales tax is at all comparable, it has upheld the tax against attack based upon the Commerce Clause. *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 305 U. S. , 59 Sup. Ct. 376 (January 30, 1939); *Southern Pacific Company* v. *Gallagher*, 305 U. S. , 59 Sup. Ct. 389 (January 30, 1939); *Pacific Telephone & Telegraph Co.* v. *Gallagher*, 305 U. S. , 59 Sup. Ct. 396 (January 30, 1939); *J. Bacon & Sons* v. *Martin*, 305 U. S. 380 (January 3, 1939); *Western Live Stock* v. *Bureau*, 303 U. S. 250 (1938); *Henneford* v. *Silas Mason Co.*, 300 U. S. 577 (1937); *Wiloil Corporation* v. *Pennsyl-*

vania, 294 U. S. 169 (1935); *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86 (1934); *Edelman* v. *Boeing Air Transp.*, 289 U. S. 249 (1933); *Nashville, C. & St. L. Railway Co.* v. *Wallace*, 288 U. S. 249 (1933); *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472 (1932); *Banker Brothers* v. *Pennsylvania*, 222 U. S. 210 (1911); *Woodruff* v. *Parham*, 8 Wall. 123 (1868); *Hinson* v. *Lott*, 8 Wall. 148 (1868).

The above are all instances of non-discriminatory local taxes applied to transactions connected with interstate commerce. In almost all, the burden of the tax fell on the local purchaser-consumer. In almost all, it may be added, the tax was measured by the value or volume of the sales. The New York City sales tax is not distinguishable in any material particular from most of the taxes upheld in the cases cited above.

The New York City sales tax is, moreover, *identical* in substance with the California tax (Cal. Laws of 1935, ch. 361, as amended by Cal. Laws of 1937, chs. 401, 671 and 683) sustained in *Felt & Tarrant Mfg. Co.* v. *Gallagher*, *supra*, as the following tabular comparison plainly shows:

California Tax	New York City Tax
1. The tax is imposed on the purchaser at retail of merchandise purchased for consumption and not for resale.	1. The tax is imposed on the purchaser at retail of merchandise purchased for consumption and not for resale.
2. The tax is a given percentage of the sales price.	2. The tax is a given percentage of the sales price.
3. The tax is paid by the purchaser at the time of the sale.	3. The tax is paid by the purchaser at the time of the sale.
4. The tax is collected by the vendor, who files the returns.	4. The tax is collected by the vendor, who files the returns.
5. If the tax is not collected by the vendor, it is payable directly by the purchaser to the taxing official.	5. If the tax is not collected by the vendor, it is payable directly by the purchaser to the taxing official.

California Tax	New York City Tax
6. The tax law requires the vendor to insure payment of the tax if it fails to make the collections from the tax debtors.	6. The tax law requires the vendor to insure payment of the tax if it fails to make collections from the tax debtors.
7. The tax is on a local event, *i.e.*, "the exercise of any right or power * * * incident to the ownership of that property" other than resale.	7. The tax is on a local event, *i.e.*, the "transfer of title or possession or both" for any purpose other than resale.

The fact that the California tax is termed a "use" tax and the New York City tax a "sales" tax is a difference in words, not a difference in substance. For, "use" as defined in the California statute (see paragraph 7 in the tabular comparison above), includes every acquisition of possession and so, every sale. A mere difference in name between two taxes which are substantially the same does not justify varying constitutional treatment. As stated by this Court in *Southern Pacific Company* v. *Gallagher*, *supra*, 305 U. S. , 59 Sup. Ct. 389, 394:

> "State taxes upon national commerce or its incidents do not depend for their validity *upon a choice of words* but upon the choice of the thing taxed". (Italics ours.)

It thus appears that in invalidating the City sales tax in the case at bar, the Court of Appeals has decided the case in a way probably not in accord with applicable decisions of this Court.

POINT II

Respondent's sales do not "require or necessarily involve interstate shipment", as that phrase is used in *Wiloil Corp.* v. *Pennsylvania*, 294 U. S. 169, 174.

In holding that respondent's sales required or necessarily involved interstate shipment, we submit, the Court misapprehended the decisions of this Court in *Wiloil Corporation* v. *Pennsylvania*, 294 U. S. 169 (1935), and *Banker Brothers* v. *Pennsylvania*, 222 U. S. 210 (1911).

In the *Wiloil* case, *supra*, as in the case at bar, the sale was made in the buyer's State, called for delivery of the merchandise in that jurisdiction, and related to standard goods. Despite the fact that the contracts called for delivery in Pennsylvania of oil "f.o.b. Wilmington, Delaware," this Court concluded that the contracts did not require or necessarily involve interstate shipment, stating, in language precisely applicable at bar (294 U. S., at p. 173):

> "Appellant was not required by the contracts to obtain the fuels at Wilmington but was free to effect performance by shipping from any place within or without Pennsylvania."

And further (p. 174):

> "There is nothing to indicate legislative purpose to discriminate against liquid fuels brought into Pennsylvania to be delivered in fulfillment of sales contracts or there to be used or sold. The commerce clause does not prevent taxation of goods by the State in which they are found merely because brought in from another State, for that would

unduly trammel state power of taxation and produce gross inequality and injustice. *Woodruff* v. *Parham*, 8 Wall. 123, 137. *The limitation appellant puts on §4 would operate to the extent of three cents a gallon in favor of liquid fuels delivered, as in this case, from a place in another State, against those delivered in Pennsylvania from sources in that Commonwealth over routes wholly therein.*" (Italics ours.)

The Court indicated in a general way that the tax was upon the local sales. It pointed out, moreover, that the fact that the entire movement of the oil from Delaware into Pennsylvania involved interstate commerce—which would have been material had federal regulation been involved—was not pertinent when the inquiry was directed to state taxation of local sales (p. 175).

Finally, the Court summarized the transaction involved and the effect of the tax imposed upon it, as follows (p. 175):

> "As interstate transportation was not required or contemplated, it may be deemed as merely incidental. Cf. *Moore* v. *N. Y. Cotton Exchange*, 270 U. S. 593, 604. *Ware & Leland* v. *Mobile County*, 209 U. S. 405, 412-413. The act lays no burden on interstate commerce as such, and if any can be said to result from the imposition, it is indirect and precisely as that which would have resulted if deliveries had been made exclusively by intrastate transportation from Pennsylvania sources."

Conclusion

The Commerce Clause does not require that in an effort to avoid undue burdens on interstate commerce, sales made within the State, under contracts made there, of goods shipped in (for the seller's convenience and economy) from outside the State, be exempted from a general consumer's sales tax. Such a tax, paid as it is by the consumer and measured by the volume of sales, is not duplicated in any other State, for the act taxed—the final passage of possession and title to the *res* to the consumer—can occur in but one State. Local merchants must be protected against unjustifiable discrimination in favor of foreign vendors. The States must be protected against the serious impairment of their revenue powers by the encouragement of tax avoidance and evasion. Respondent's purchasers obtain the protection of the laws of New York for their purchases there and should not be permitted to escape the common burden of all purchasers in the local market.

The petition for certiorari should be granted.

Dated: New York, N. Y., May 3, 1939.

Respectfully submitted,

WILLIAM C. CHANLER,
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SOL CHARLES LEVINE,
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APPENDIX A

Provisions of Local Law

LOCAL LAWS OF THE CITY OF NEW YORK

FOR THE YEAR 1934.

No. 24

A Local Law to Amend Local Law Number Twenty of the Year Nineteen Hundred and Thirty-four to Relieve the People of the City of New York from the Hardships and Suffering Caused by Unemployment and the Effects Thereof on the Public Health and Welfare, by Imposing a Tax Upon Receipts from Sales of Certain Properties and Rendering of Certain Services in the City of New York, to Enable Such City to Defray the Cost of Granting Unemployment Work and Home Relief.

Be it enacted by the Municipal Assembly of The City of New York as follows:

Section 1. Local law number twenty of the local laws of the city of New York for the year nineteen hundred and thirty-four, entitled: "A local law to relieve the people of the city of New York from the hardships and suffering caused by unemployment and the effects thereof on the public health and welfare, by imposing a tax upon receipts from sales of certain properties and services in the city of New York, to enable such city to defray the cost of granting unemployment work and home relief," is hereby amended so as to read as follows:

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Tax on sales of certain properties and rendering of certain services in the city of New York:

Section 1. Definitions.
2. Imposition of tax.
3. Collection of tax from purchaser.
4. Records to be kept.
5. Returns.
6. Payment of taxes.
7. Determination of tax by the comptroller.
8. Proceedings to recover tax.
9. Notices and limitations of time.
10. Refunds.
11. General powers of the comptroller.
12. Administration of oaths and compelling testimony.
13. Reference to tax.
14. Registration.
15. Penalties.
16. Returns to be secret.
17. Disposition of revenues.
18. Application; construction.

§ 1. Definitions. When used in this local law:

(a) The word "person" includes an individual, co-partnership, society, association, joint stock company, corporation, estate, receiver, trustee or any other person acting in a fiduciary capacity, and any combination of individuals;

(b) The word "vendor" means a person selling property or rendering services upon the receipts from which a tax is imposed under section 2 of this local law;

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(c) The word "purchaser" means a person who purchases property or to whom are rendered services, receipts from which are taxable under section 2 of this local law;

(d) The word "receipt" means the amount of the sale price of any property or the charge for any service specified in section 2 of this local law, valued in money, whether received in money or otherwise, including all receipts, cash, credits and property of any kind or nature (other than the credit allowed for property of the same kind accepted in part payment and intended for resale), and also any amount for which credit is allowed by the vendor to the purchaser, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service cost, interest or discount paid, or any other expense whatsoever;

(e) The word "sale" or "selling" means any transfer of title or possession or both, exchange or barter, license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, and may include the rendering of any service specified in section 2 of this local law;

(f) The words "tangible personal property" mean corporeal personal property;

(g) A "retail sale" or "sale at retail" means a sale to a customer, or to any person for any purpose other than for resale in the form of tangible personal property;

(h) The word "semi-public" means those charitable and religious institutions which are supported wholly or in part by public subscriptions or endowment and are not organized or operated for profit;

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(i) The word "return" includes any amended return filed or required to be filed as herein provided;

(j) The word "comptroller" means the comptroller of the city of New York.

§ 2. Imposition of tax. During the period commencing on December tenth, nineteen hundred and thirty-four, and ending on December thirty-first, nineteen hundred and thirty-five, there shall be paid a tax of two per centum upon the amount of the receipts from every sale in the city of New York of:

(a) Tangible personal property sold at retail, except those articles described in schedule "A" below;

(b) Gas, electricity, refrigeration and steam, and gas, electric, refrigeration, steam, telephone and telegraph service, for domestic or commercial use;

(c) Food, drink and entertainment in restaurants, cafes and other establishments including in the amount of such receipts any cover or minimum or other charge made to patrons where the charge to the patron is one dollar or more, in which event the tax is imposed on the full amount of the charge to each such patron;

(d) Wines and liquors and other alcoholic beverages, and drinks compounded thereof or therewith, except beer or other similar malt beverages, including sales thereof in restaurants, cafes, bars and other places for consumption on the premises:

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Cereals and cereal products;
Milk and milk products;
Meat and meat products;
Fish and fish products;
Eggs and egg products;
Vegetables and vegetable products;
Fruits, spices and salt;
Sugar and sugar products, other than candy and confectionery;
Coffee and coffee substitutes; beer or other similar malt beverages; tea, cocoa and cocoa products; other than candy and confectionery;
Water, when delivered to the consumer through mains and pipes;
Drugs and medicines sold upon a physician's prescription;
Newspapers and periodicals.

The enumeration in this schedule shall not be deemed to exclude sales of wines and liquors and other alcoholic beverages, soft drinks, and sodas and beverages such as are ordinarily dispensed at bars and soda fountains or in connection therewith (other than coffee, tea and cocoa, beer and other similar malt beverages), nor any food or food products unless sold for human consumption, from the tax imposed by this local law.

Receipts from sales or services by or to the state or city of New York, and receipts from sales or services by or to semi-public institutions, and receipts upon which the state of New York and city of New York are by virtue of the provisions of the constitution of the United States or

otherwise without power to impose a tax shall not be subject to tax hereunder.

Upon each taxable sale or service the tax to be collected shall be stated and charged separately from the sale price or charge for service and shown separately on any record thereof, at the time when the sale is made or evidence of sale issued or employed by the vendor and shall be paid by the purchaser to the vendor, for and on account of the city of New York, and the vendor shall be liable for the collection or the service rendered; and the vendor shall have the same right in respect to collecting the tax from the purchaser, or in respect to non-payment of the tax by the purchaser, as if the tax were a part of the purchase price of the property or service and payable at the time of the sale.

Where a purchaser has failed to pay and a vendor has failed to collect a tax upon a sale or service, as imposed by this local law, then in addition to all other rights, obligations and remedies provided, such tax shall be payable by the purchaser directly to the comptroller and it shall be the duty of the purchaser to file a return thereof with the comptroller and to pay the tax imposed thereon to the comptroller within fifteen days after such sale was made or service rendered.

The comptroller may, wherever he deems it necessary for the proper enforcement of this local law, provide by regulation that the purchaser shall file returns and pay directly to the comptroller the tax herein imposed, at such times as returns are required to be filed and payment over made by vendors.

The tax imposed by this local law shall be paid upon all sales made and services rendered on and after Decem-

ber tenth, nineteen hundred and thirty-four, although made or rendered under a contract dated prior to December tenth, nineteen hundred and thirty-four. Where a service is billed on either a monthly or other term basis, the bill for such month or other terms shall be a receipt subject to the tax herein imposed provided that where such bill includes a period prior to December tenth, nineteen hundred and thirty-four, or subsequent to December thirty-first, nineteen hundred and thirty-five, such bill shall be equitably apportioned. The comptroller may provide by regulation that the tax upon receipts from sales on the installment plan may be paid on the amount of each installment and upon the date when such installment is due. He shall provide by regulation for the exclusion of amounts representing sales where the contract of sale has been cancelled and/or the property returned and/or the receipt has been ascertained to be worthless, or, in case the tax has been paid upon such receipts, for a credit and/or a refund of the amount of the tax upon such receipts, upon application therefor as provided in section 10.

For the purpose of the proper administration of this local law and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property and services mentioned in this section are subject to the tax until the contrary is established, and the burden of proving that a receipt is not taxable hereunder shall be upon the vendor or the purchaser, unless the vendor shall have taken from the purchaser a certificate signed by and bearing the name and address of the purchaser and the number of his registration certificate to the effect that the property or service was purchased for resale.

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No person engaged in the business of selling property or services the receipts from which are subject to tax under this local law shall advertise or hold out to the public in any manner directly or indirectly that the tax imposed by this local law is not considered as an element in the price to the purchaser.

§ 3. Collection of tax from purchaser. The comptroller shall by regulation prescribe a method or methods and/or a schedule or schedules of the amounts to be collected from purchasers in respect to any receipt upon which a tax is imposed by this local law so as to eliminate fractions of one cent and so that the aggregate collections of taxes by a vendor shall, as far as practicable, equal two percentum of the total receipts from the sales and services of such vendor upon which a tax is imposed by this local law. Such schedule or schedules may provide that no tax need be collected from the purchaser upon receipts below a stated sum, and may be amended from time to time so as to accomplish the purposes herein set forth.

§ 4. Records to kept. Every vendor shall keep records of receipts and of the tax payable thereon, in such form as the comptroller may by regulation require. Such records shall be offered for inspection and examination at any time upon demand by the comptroller or his duly authorized agent or employee and shall be preserved for a period of three years, except that the comptroller may consent to their destruction within that period or may require that they be kept longer.

§ 5. Returns. Every vendor shall file with the comptroller a return of his receipts and of the taxes payable thereon for the periods ending February twenty-eighth, May thirty-first, August thirty-first and December thirty-first, nineteen hundred and thirty-five. Such returns shall be filed within thirty days from the expiration of the period covered thereby. The comptroller may permit returns to be made by other periods so as to include all receipts during the period from December tenth, nineteen hundred and thirty-four, to December thirty-first, nineteen hundred and thirty-five, inclusive. If he deems it necessary in order to insure the payment of the tax imposed by this local law the comptroller may require returns of receipts to be made for other than the aforesaid periods and upon such dates as he may specify.

The form of returns shall be prescribed by the comptroller and shall contain such information as he may deem necessary for the proper administration of this local law. The comptroller may require amended returns to be filed within twenty days after notice and to contain the information specified in the notice.

§ 6. Payment of taxes. At the time of filing a return of receipts each vendor shall pay to the comptroller the taxes imposed by this local law upon the receipts required to be included in such return. All taxes for the period for which a return is required to be filed shall be due from the vendor and payable to the comptroller on the date limited for the filing of the return for such period, without regard to whether a return is filed or whether the return which is filed correctly shows the amount of receipts and the taxes due thereon. The comptroller may require any

vendor required to collect the tax imposed by this local law to file with him a bond, issued by a surety company authorized to transact business in this state and approved by the superintendent of insurance of this state as to solvency and responsibility, in such amount as the comptroller may fix, to secure the payment of any tax and/or penalties due or which may become due from such vendor. In lieu of such bond, securities approved by the comptroller, in such amount as he may prescribe, may be deposited with him, which securities shall be kept in the custody of the comptroller and may be sold by him at public or private sale, without notice to the depositor thereof, if it becomes necessary so to do in order to recover any tax and/or penalties due. Upon such sale, the surplus, if any, above the amounts due under this local law shall be returned to the person who deposited the securities.

§ 7. Determination of tax by comptroller. If a return required by this local law is not filed, or if a return when filed is incorrect or insufficient the comptroller shall determine the amount of tax due from such information as he may be able to obtain and, if necessary, may estimate the tax on the basis of external indices, such as number of employees of the person concerned, rentals paid by him, his stock on hand, and/or other factors. The comptroller shall give notice of such determination to the person liable for the collection and/or payment of the tax. Such determination shall finally and irrevocably fix the tax unless the vendor or purchaser against whom it is assessed shall be entitled to and within thirty days after the giving of notice of such determination apply to the comptroller for

a hearing, or shall cause the same to be reviewed by certiorari, or unless the comptroller of his own motion shall reduce the same. If no opportunity for a hearing shall have been given to such person prior to the determination of the comptroller, such person may within thirty days after the comptroller shall give notice thereof, apply to the comptroller for a hearing. After such hearing the comptroller shall give notice of his determination to the applicant. The determination of the comptroller may be reviewed by certiorari if application is made to the comptroller therefor within thirty days after the giving of notice thereof. Whenever under this local law an order of certiorari is permitted it shall not be granted unless the amount of any tax sought to be reviewed, with penalties thereon, if any, shall first deposited with the comptroller and an undertaking filed with the comptroller, in such amount and with such sureties as a justice of the supreme court of the state of New York shall approve, to the effect that if such order be dismissed or the tax confirmed the applicant for the writ will pay all costs and charges which may accrue in the prosecution of the certiorari proceeding.

§ 8. Proceeding to recover tax. Whenever any vendor or purchaser shall fail to collect and pay over any tax and/or to pay any tax or penalty imposed by this local law as in this local law provided, the corporation counsel shall, upon the request of the comptroller, bring an action to enforce the payment of the same.

As an additional or alternate remedy, the comptroller may issue a warrant, directed to the sheriff of any county within the city of New York, commanding him to levy

upon and sell the real and personal property of the vendor or purchaser which may be found within his county, for the payment of the amount thereof, with any penalties, and the cost of executing the warrant, and to return such warrant to the comptroller and to pay to him the money collected by virtue thereof within sixty days after the receipt of such warrant. The sheriff shall within five days after the receipt of the warrant file with the clerk of his county a copy thereof, and thereupon such clerk shall enter in the judgment docket the name of the person mentioned in the warrant and the amount of the tax and penalties for which the warrant is issued and the date when such copy is filed. Thereupon the amount of such warrant so docketed shall become a lien upon the title to and interest in real property and chattels real of the person against whom the warrant is issued in the same manner as a judgment duly docketed in the office of such clerk. The sheriff shall then proceed upon the warrant in the same manner, and with like effect, as that provided by law in respect to executions issued against property upon judgments of a court of record, and for services in executing the warrant he shall be entitled to the same fees, which he may collect in the same manner. In the discretion of the comptroller a warrant of like terms, force and effect may be issued and directed to any officer or employee of the department of finance, and in the execution thereof such officer or employee shall have all the powers conferred by law upon sheriffs, but he shall be entitled to no fee or compensation in excess of the actual expenses paid in the performance of such duty. If a warrant is returned not satisfied in full, the comp-

troller may from time to time issue new warrants and shall also have the same remedies to enforce the amount due thereunder as if the city of New York had recovered judgment therefor and execution thereon had been returned unsatisfied.

§ 9. Notices and limitations of time. Any notice authorized or required under the provisions of this local law may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this local law or in any application made by him or if no return has been filed or application made then to such address as may be obtainable. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this local law by the giving of notice shall commence to run from the date of mailing of such notice.

The provisions of the civil practice act relative to limitations of time for the enforcement of a civil remedy shall not apply to any proceeding or action taken to levy, appraise, assess, determine or enforce the collection of any tax or penalty provided by this local law.

§ 10. Refunds. The comptroller shall refund any tax erroneously or illegally collected and paid to him if application therefor shall be made within one year from the payment thereof. Such application may be made by the person upon whom such tax was imposed, or by the vendor who collected and paid such tax to the comptroller

if such vendor establishes to the satisfaction of the comptroller, under such regulations as he may prescribe, that he has repaid to the purchaser the amount for which application for refund is made. The comptroller may, in lieu of any refund required to be made, allow credit therefor on subsequent payments due from the applicant. Notice of the determination of the comptroller of any application for refund shall be given to the applicant, who shall be entitled to a certiorari order to review such determination, provided application therefor is made within thirty days after the giving of such notice. An order of certiorari shall not be granted hereunder except in accordance with the provisions of section 7.

§ 11. General powers of the comptroller. In addition to the powers granted to the comptroller in this local law, he is hereby authorized and empowered:

(a) To make, adopt and amend rules and regulations appropriate to the carrying out of this local law and the purposes thereof;

(b) To extend, for cause shown, the time of filing any return for a period not exceeding thirty days; and for cause shown, to remit penalties and interest; and to compromise disputed claims in connection with the taxes hereby imposed;

(c) To assess, revise, readjust and impose the taxes authorized to be imposed under this local law;

(d) To request information from the tax commission of the state of New York relative to any person; and to afford information to such tax commission relative to any

person, any other provision of this local law to the contrary notwithstanding;

(e) To delegate his functions hereunder to a deputy comptroller or other employee or employees of the department of finance of the city of New York;

(f) To prescribe methods for determining the receipts from sales made or services rendered in the city of New York.

§ 12. Administration of oaths and compelling testimony. The comptroller or his employee duly designated and authorized by the comptroller shall have power to administer oaths and take affidavits in relation to any matter or proceeding in the exercise of the powers and duties of the comptroller under this local law. The comptroller shall have power to subpoena and require the attendance of witnesses and the production of books, papers and documents to secure information pertinent to the performance of his duties hereunder and of the enforcement of this local law, and to examine them in relation thereto, and to issue commissions for the examination of witnesses who are out of the state or unable to attend before him or excused from attendance.

A justice of the supreme court either in court or at chambers shall have power summarily to enforce by proper proceedings the attendance and testimony of witnesses and the production and examination of books, papers and documents called for by the subpoena of the comptroller hereunder.

Any person who shall refuse to testify or to produce books or records or who shall testify falsely in any mate-

rial matter pending before the comptroller hereunder shall be guilty of a misdemeanor, and punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment.

The officers who serve the comptroller's summons or subpoena hereunder and witnesses attending in response thereto shall be entitled to the same fees as are allowed to officers and witnesses in civil cases in courts of record, except as herein otherwise provided.

§ 13. Reference to tax. Wherever reference is made in sales tags or placards or advertisements to this tax, such reference shall be substantially in the following form: "City sales tax for relief of unemployed," except that in any evidence or memorandum of sale issued or employed by the vendor the word "tax" will suffice.

§ 14. Registration. On or before January tenth, nineteen hundred and thirty-five, or in the case of vendors commencing business after January seventh, nineteen hundred and thirty-five, or opening new places of business after such date, within three days after such commencement or opening, every vendor required to collect the tax imposed by this local law shall file with the comptroller a certificate of registration in a form prescribed by the comptroller who shall within five days after such registration issue without charge to each such vendor a (certificate of authority empowering such vendor to collect the tax from the purchaser) and duplicates thereof for each additional place of business of such vendor. Each certificate or duplicate shall state the place of business to which it is applicable. Such certificates of authority shall be

prominently displayed in the places of business of the vendor. A vendor who has no regular place of doing business shall attach such certificate to his cart, stand, truck, or other merchandising device. Such certificates shall be non-assignable and non-transferable and shall be surrendered immediately to the comptroller upon the vendor's ceasing to do business at the place therein named.

A vendor shall refuse to accept a certificate that any property or service upon which a tax is imposed by this local law is purchased for resale and shall collect the tax imposed by this local law unless the purchaser shall have filed a certificate of registration and received a certificate of authority to collect the tax imposed by this local law: provided, however, that the payment of the tax by such purchaser shall not relieve the purchaser of the duty herein imposed upon such purchaser to collect the tax upon any resale made by him; but such purchaser who shall thereafter file a certificate of registration and receive a certificate of authority to collect the tax may, upon application therefor, receive a refund of the taxes paid by him upon property and services thereafter resold by him and upon the receipts from which he shall have collected and paid over to the comptroller the tax herein imposed.

§ 15. Penalties. Any person failing to file a return or to pay or pay over any tax to the comptroller within the time required by this local law shall be subject to a penalty of five per centum of the amount of tax due, plus one per centum of such tax for each month of delay or fraction thereof excepting the first month after such return was required to be filed or such tax became due; but the comptroller, if satisfied that the delay was excusable,

may remit all or any part of such penalty. Such penalty shall be paid and disposed of in the same manner as other revenues from this local law. Unpaid penalties may be enforced in the same manner as the tax imposed by this local law.

Any vendor or purchaser and any officer of a corporate vendor or purchaser failing to file a return required by this local law, or filing or causing to be filed or making or causing to be made or giving or causing to be given any return, certificate, affidavit, representation, testimony or statement required or authorized by this local law, which is wilfully false, and any vendor and any officer of a corporate vendor wilfully failing to file a registration certificate or to display or surrender the certificate of authority as required by this local law or assigning or transferring such certificate of authority, and any vendor and any officer of a corporate vendor wilfully failing to charge separately from the sales price the tax herein imposed, or wilfully failing to state such tax separately on any evidence of sale issued or employed by the vendor, or wilfully failing or refusing to collect such tax from the purchaser, and any vendor and any officer of a corporate vendor who shall refer or cause reference to be made to this tax in any sales tag, placard or advertisement in a form other than that required by this local law, shall, in addition to the penalties herein or elsewhere prescribed, be guilty of a misdemeanor, punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment.

The certificate of the comptroller to the effect that a tax has not been paid, that a return has not been filed, or

that information has not been supplied pursuant to the provisions of this local law, shall be presumptive evidence thereof.

§ 16. Returns to be secret. 1. Except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for the comptroller or any officer or employee of the department of finance to divulge or make known in any manner the receipts or other information relating to the business of a taxpayer contained in any return required under this local law. The officers charged with the custody of such returns shall not be required to produce any of them or evidence of anything contained in them in any action or proceeding in any court, except on behalf of the comptroller in an action or proceeding under the provisions of this local law, or on behalf of any party to any action or proceeding under the provisions of this local law when the returns or facts shown thereby are directly involved in such action or proceeding, in either of which events the court may require the production of, and may admit in evidence, so much of said returns or of the facts shown thereby, as are pertinent to the action or proceeding and no more. Nothing herein shall be construed to prohibit the delivery to a taxpayer or his duly authorized representative of a certified copy of any return filed in connection with his tax nor to prohibit the publication of statistics so classified as to prevent the identification of particular returns and the items thereof, or the inspection by the corporation counsel or other legal representatives of the city, or by the district attorney of any county within the city of New York, of the return of any taxpayer who shall bring action to set

aside or review the tax based thereon, or against whom an action or proceeding has been instituted for the collection of a tax or penalty. Returns shall be preserved for three years and thereafter until the comptroller orders them to be destroyed.

2. Any offense against subdivision one of this section shall be punished by a fine not exceeding one thousand dollars or by imprisonment not exceeding one year, or both, at the discretion of the court, and if the offender be an officer or employee of the city he shall be dismissed from office and be incapable of holding any public office in this city for a period of five years thereafter.

§ 17. Disposition of revenues. All revenues and monies resulting from the imposition of the taxes imposed by this local law shall be paid into the treasury of the city of New York and shall not be credited or deposited in the general fund of the city of New York, but shall be deposited in a separate bank account or accounts, and shall be available and used solely and exclusively for the purpose of relieving the people of the city of New York from the hardships and suffering caused by unemployment including the repayment of monies borrowed or to be borrowed in anticipation of this tax.

§ 18. Application; construction. If any provision of this local law, or the application thereof to any person or circumstances, is held invalid, the remainder of this local law, and the application of such provisions to other persons or circumstances shall not be affected thereby. This local law shall be construed in conformity with chapter

eight hundred seventy-three, laws of nineteen hundred and thirty-four, pursuant to which it is enacted.

Sec. 2. Effective date of local law. This local law shall take effect immediately.

The City of New York, Office of the City Clerk, ss:

I hereby certify that the foregoing is a true copy of a local law passed by both branches of the Municipal Assembly of The City of New York and approved by the Mayor on December 28, 1934, on file in this office.

MICHAEL J. CRUISE,
City Clerk.

APPENDIX B

Provisions of State Enabling Act

LAWS OF NEW YORK

CHAPTER 873

An Act to Enable, Temporarily, Any City of the State Having a Population of One Million Inhabitants or More to Adopt and Amend Local Laws, Imposing in Any Such City Any Tax and/or Taxes Which the Legislature Has or Would Have Power and Authority to Impose to Relieve the People of Any Such City from the Hardships and Suffering Caused by Unemployment and to Limit the Application of Such Local Laws.

Became a law August 18, 1934, with the approval of the Governor. Passed, on emergency message, by a two-thirds vote.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Notwithstanding any other provision of law to the contrary, any city of the state having a population of one million inhabitants or more acting through its local legislative body, is hereby authorized and empowered until December thirty-first, nineteen hundred thirty-five to adopt and amend local laws imposing in any such city any tax and/or taxes which the legislature has or would have power and authority to impose to relieve the people of any such city from the hardships and suffering caused by unemployment and make provision for the collection thereof by the chief fiscal officer of any such city. The tax or taxes imposed pursuant to such local laws shall be effective only during the period commencing when this act becomes effective and ending December thirty-first, nine-

teen hundred thirty-five, or any portion of such period. A tax imposed hereunder shall have application only within the territorial limits of any such city and shall be in addition to any and all other taxes.

This act shall not authorize the imposition of a tax on any transaction originating and/or consummated outside of the territorial limits of any such city, notwithstanding that some act be necessarily performed with respect to such transaction within such limits.

This act shall not authorize the imposition of a tax on a non-resident of such city or on account of any transaction by or with a non-resident of such city, except when imposed without discrimination as between residents and non-residents, on account of tangible property actually located or income earned, or trades, businesses or professions carried on within such city, or on account of transfers, retail sales or other transactions actually made or consummated within such city by a non-resident while within such city. A corporation shall not be deemed a non-resident by reason of the fact its principal place of business is not within the city.

A person who has a permanent place of abode without such city and lives more than seven months of the year out of such city shall be deemed a non-resident within the meaning of this act.

Provided, however, that nothing herein contained shall limit or prevent the imposition of a tax on gross income or a tax on gross receipts of persons, firms and corporations doing business in any such city. No such person, firm or corporation, however, shall be subject to the imposition of more than one tax by any such city on gross income or gross receipts under the provisions of this act.

§ 2. Revenues resulting from the imposition of taxes authorized by this act shall be paid into the treasury of any such city and shall not be credited or deposited in the general fund of any such city, but shall be deposited in a separate bank account or accounts and shall be available and used solely and exclusively for the relief purposes for which the said taxes have been imposed under the provisions of this act.

Such legislative body may authorize the performance of public work for the relief purposes aforesaid to be paid for out of the tax or taxes, imposed under this act, and which may be undertaken other than by contract by such municipal corporation, during the period aforesaid, through and under its local emergency work bureau or by its public welfare or other department under the supervision and control of its local emergency work bureau. These provisions shall be effective notwithstanding any provisions contained in any charter, or in any general, special or local laws to the contrary and notwithstanding any such provisions therein contained requiring such work as may be undertaken to be let by contract.

§ 3. This act shall take effect immediately.

STATE OF NEW YORK, DEPARTMENT OF STATE, ss.:

I have compared the preceding with the original law on file in this office, and do hereby certify that the same is a correct transcript therefrom and of the whole of said original law.

EDWARD J. FLYNN,
Secretary of State.

APPENDIX C

1. Memorandum Opinion of Court of Appeals in *Felt & Tarrant* Case

In the Matter of FELT & TARRANT MFG. CO., Respondent, against JOSEPH D. MCGOLDRICK, as Comptroller of the City of New York, Appellant.

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered May 27, 1938, which annulled a determination of the Comptroller of the City of New York assessing against petitioner a sales tax pursuant to Local Law No. 20 of 1934 (published as No. 21), as amended by Local Law No. 24 (published as No. 25).

William C. Chanler, Corporation Counsel (*Milton Sandberg* and *Bernard H. Sherris* of counsel) for appellant.

Newton K. Fox, for respondent.

Order affirmed with costs, upon the authority of *Matter of National Cash Register Co.* v. *Taylor* (276 N. Y. 208). No opinion.

Concur: CRANE, CH.J., LEHMAN, O'BRIEN, HUBBS, LOUGHRAN, FINCH and RIPPEY, JJ.

Appendix C

2. Opinion of Appellate Division in *Felt & Tarrant* Case

In the Matter of the Application of FELT & TARRANT MFG. Co., Petitioner, for an Order of Certiorari against FRANK J. TAYLOR, Comptroller of the City of New York, Respondent.

CERTIORARI ORDER granted out of the Supreme Court on the 10th day of March, 1937, and directed to Frank J. Taylor, comptroller of the city of New York, commanding him to certify and return to the office of the clerk of the county of New York all and singular his proceedings had and determination made in assessing a sales tax deficiency against the petitioner, pursuant to Local Law No. 20 (published as No. 21) of the New York City Local Laws of 1934, as amended by Local Law No. 24 (published as No. 25) of the New York City Local Laws of 1934, known as the New York City Retail Sales Tax Law.

Newton K. Fox, for the petitioner.

Frank J. Derrick of counsel [*Oscar S. Cox* and *Bernard H. Sherris* with him on the brief; *William C. Chanler, Corporation Counsel,* attorney], for the respondent.

GLENNON, J. It is conceded by the petitioner that the tax on certain items amounting to $148.55 was properly levied and consequently, having paid $3,122.53 the full amount assessed, it seeks a refund of the difference, amounting to $2,973.98, with interest from February 19, 1937, the date of payment.

The petitioner, Felt & Tarrant Mfg. Co., is an Illinois corporation. It has never qualified to do business in the State of New York. It has its principal office and place of

business in Chicago and is engaged in the business of manufacturing and selling comptometers, adding and calculating machines. The company has no manufacturing plant, warehouse or other depository in the State of New York. All manufacturing is done at Chicago. It maintains an office in New York city for the purpose of soliciting orders for comptometers. This business is done by a principal solicitor and his assistants. The authority of the employees is restricted to the soliciting of orders. The agreement under which they work provides as follows:

"It is Mutually Understood and Agreed

"1. That the said party of the Second Part is merely a solicitor for orders, and that all orders taken must be submitted to and approved by the Felt & Tarrant Mfg. Co. and that all sales and deliveries shall be made by the Felt & Tarrant Mfg. Co."

A standard form of order blank is used. The order is addressed to "Felt & Tarrant Mfg. Co." The order blank contains the following statement: "All orders subject to the acceptance of an officer of the company in Chicago."

If the order is approved by an officer in Chicago, it is sent to its billing department there. A comptometer is then appropriated to the contract of sale by the shipping department and its serial number is inserted in the upper right-hand corner of the order. The machines are then packed in individual cartons for shipment by a common carrier in Illinois to the purchaser here. The shipping order is then turned over to the billing department, where an invoice is made out for the specific machine. The invoice, which is sent from Chicago to the customer, shows the serial number of the comptometer which was shipped.

Appendix C

The invoice has a statement on its face: "Make all checks payable to Company—remit directly to Chicago." All remittances are received and collections made at the company's home office. No billings or collections are made in New York city. No comptometers are kept in New York for the purpose of sale. There are some which are used for what is called "repair loans" and demonstration purposes. "Repair loans" refer to machines which are loaned to customers in the event that those purchased directly become defective and need repair. The servicing of the comptometers is done by the Comptometer Company, a Delaware corporation, authorized to do business in New York.

It was stated on the argument that the practice employed by petitioner in the conduct of its business was followed for a long period of time prior to the enactment of the New York city sales tax. The petitioner in the sale and shipment of its machines from Chicago to New York is engaged in interstate commerce, and consequently the municipal authorities have no right to impose a tax upon the receipts.

We can find no fundamental difference in the facts now under review from those which were before the court in *Matter of National Cash Register Co.* v. *Taylor* (276 N. Y. 208). There Judge LEHMAN said: "The power of the State of New York to tax receipts derived from transactions in interstate commerce is limited by the provisions of the Constitution of the United States. The power of the city of New York to tax receipts from sales is conferred upon it by statute (Laws of 1934, ch. 873). The power so conferred cannot transcend the limitations imposed upon the power of the State by the Constitution

of the United States, and it is restricted further by limitations imposed by the State in the enabling act. That act provides expressly that it does not 'authorize the imposition of a tax on any transaction originating and/or consummated outside of the territorial limits of any such city, notwithstanding that some act be necessarily performed with respect to such transaction within such limits.'"

For the reason assigned, the determination of the comptroller should be annulled, with fifty dollars costs and disbursements to the petitioner.

MARTIN, P. J., O'MALLEY, UNTERMYER and DORE, JJ., concur.

Determination unanimously annulled, with fifty dollars costs and disbursements to the petitioner. Settle order on notice.

3. Opinion of the Court of Appeals in *Compagnie Generale Transatlantique* Case

In the Matter of the Application of COMPAGNIE GENERALE TRANSATLANTIQUE, Respondent, against JOSEPH D. MCGOLDRICK, as Comptroller of the City of New York, Appellant.

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 14, 1938, in a proceeding under article 78 of the Civil Practice Act, in so far as such order annuls a determination of the Comptroller of the City of New York assessing a sales tax deficiency against the petitioner for

the period from December 10, 1934, to December 31, 1935, under New York City Local Law No. 20 (published as No. 21) of 1934, as amended by Local Law No. 24 (published as No. 25) of 1934. The assessment in question was against the petitioner, as the purchaser of fuel oil from the Standard Oil Company, which maintained plants or storage tanks in the State of New Jersey. The order of the Appellate Division stated that the determination of the Comptroller with respect to deliveries originating in New Jersey should be annulled and in other respects confirmed; and also directed that the defendant return to the petitioner the amount (less a stated sum) of such deficiency sales tax which had previously been deposited, under protest, with the Comptroller by petitioner. The sum not ordered returned represented the amount of tax which was conceded to be payable on certain deliveries of fuel oil supplied from localities within the City of New York. As to such part of the assessed tax the determination of the Comptroller was confirmed.

William C. Chanler, Corporation Counsel (*Sol Charles Levine, Edmund B. Hennefeld* and *Jerome R. Hellerstein* of counsel), for appellant.

Herbert K. Stockton for respondent.

H. Maurice Fridlund and *James R. Roberts for Kirlin, Campbell, Hickox, Keating & McGrann, amici curiae.*

CRANE, CH. J.:

This appeal involves the same question as that presented in its companion case, *Matter of Sears, Roebuck*

& Co. v. *McGoldrick* (279 N. Y. 184). Should the principles there stated lead to a different result on the facts in this case?

The Standard Oil Company, having numerous oil tanks in New Jersey, by New York contract sold and delivered oil to the respondent's steamships at its piers in New York City. A tax upon these sales for the period from December 10, 1934 to December 31, 1935, has been set aside below, as an illegal burden upon interstate commerce. The only distinction upon the facts in this case and those in the *Sears, Roebuck & Co.* case rests in the nature of the respondent's business. The respondent buys two classes of oil for steamships—fuel oil, and Diesel fuel oil. In the briefs these are referred to as "Standard Bunker Fuel Oil" and "Standard Diesel Fuel Oil." The storage tanks containing large quantities of these oils are at Bayonne, New Jersey.

The contract for the period in question for fuel oil is contained in a letter accepting an offer to extend a previous fuel oil contract until December 31, 1936. It states that the Standard Oil Company of New Jersey is to supply the total fuel oil requirements at New York of all the oil burning vessels of the Compagnie Generale Transatlantique during the period of the contract up to a maximum of four million barrels per year. The maximum price is fixed at $1.10 per barrel, with provision for increases. The contract for the Diesel fuel was also made at New York for a period up to December 31, 1935, not to exceed fifteen thousand barrels in any one month, and up to, but not exceeding one hundred thousand barrels during the term of one year. Delivery shall be made by

barge provided by the seller to the buyer's vessel at dock within the harbor limits at New York, or to the buyer's vessel alongside dock of seller at New York. The price varies according to the place of delivery.

These two companies have been doing business for many years, and it was well understood that the oil of the Standard Oil Company of New Jersey was stored in thousands of tanks in Bayonne, New Jersey. So far as this record shows, it had no storage facilities in New York City. As the *Normandie* or the *Paris* or the *Champlain* or the *Lafayette* approached the harbor in New York, messages were sent to the Standard Oil Company's office in New York City indicating the amount of fuel that would be necessary, and with the docking of the steamer at the steamship company's pier, barges of the oil company would soon be alongside prepared to pump the oil into the steamer's tanks. The oil was brought from New Jersey by the oil company's barges. Both the Standard Oil Company of New Jersey and the Compagnie Generale Transatlantique were doing business in the City of New York. The latter had its piers and office at the foot of Fiftieth Street, and places of business at 19 State Street and 610 Fifth Avenue, Manhattan. The offices of the Standard Oil Company of New Jersey were at 26 Broadway, New York City.

Unless there be some material difference between the sales in this case and those in the *Sears, Roebuck* case, we shall be obliged to sustain the tax. What difference do we find? In the first place, the Standard Oil Company of New Jersey maintains a large number of oil tanks in Bayonne, New Jersey and the vicinity. The steamship company knew that the nature of the business required oil

to be stored in large quantities, and that the oil company had such a plant, and delivered its oil by drawing it off from these tanks into ships at Bayonne, or else into barges, to be carried to vessels at the Port of New York. While the purchase or the contract of sale was made in New York, it was with a view of getting this specific oil, the product of the Standard Oil Company of New Jersey, from its plant and tanks in New Jersey. The product in New Jersey, kept there in tanks, was the thing bargained for. So far as the record in this case goes, the contract centers around the purchase of the New Jersey oil of the kind and quantity specified. The delivery at the Port of New York was made necessary because of the draft of the steamers. The cost of transportation from Bayonne to the Port of New York increased the price.

In the *Sears, Roebuck* case the purchaser bought an article in New York according to sample. As long as he got what he ordered, it was indifferent to him where it came from. The merchandise was very largely stock goods and kept for the convenience of the seller at various depots throughout the State. The ease with which the tax could be evaded by such class of merchandise being stored without the State and sold in New York City by sample was a matter worthy of consideration, as bearing upon competition with New York goods.

Here, on the other hand, there is a special product of the Standard Oil Company of New Jersey which has to be kept in great receptacles built for the purpose which we can treat by analogy as a manufacturing plant. It is the articles of this plant in New Jersey which the purchaser seeks. At the office of the seller in New York it bargains for this oil to be put in its ships. We think, under the

principles stated in the *Sears, Roebuck* case and the authorities there cited, that this is a contract for interstate shipments, and that the tax upon such a sale is a direct tax upon interstate commerce.

The order should be affirmed with costs.

FINCH, J. (Dissenting.) The contract involved in the case at bar admittedly was made in New York for delivery in New York of a standard kind of oil procurable in the open market in New York or elsewhere, at an open market price. While customarily coming from New Jersey, it is admitted that in some instances the seller has resold oil which, pursuant to its rights under the contract, it had purchased in New York. When sold and delivered in this State, the fact that it may be used thereafter in foreign commerce does not prevent it from being taxable as a sale here (*Edelman* v. *Boeing Air Transport, Inc.*, 289 U. S. 249). In addition, since no burden is laid on interstate commerce as such, and no other or different burden than if deliveries had been made by intrastate transportation in New York, the tax is a non-discriminatory one and cannot in any view constitute an undue burden on interstate commerce (*Wilcoil Corp.* v. *Pennsylvania*, 294 U. S. 169).

The order appealed from should be reversed and the determination of the Comptroller reinstated.

LEHMAN, O'BRIEN, HUBBS, LOUGHRAN and RIPPEY, JJ., concur with CRANE, Ch. J.; FINCH, J., dissents in opinion.

Order affirmed.

4. Opinion of Court of Appeals in *Sears, Roebuck* Case

In the Matter of SEARS, ROEBUCK & Co., Appellant, against JOSEPH D. MCGOLDRICK, as Comptroller of the City of New York, Respondent.

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered April 29, 1938, which confirmed a determination of the Comptroller of the City of New York assessing a deficiency sales tax, with interest and penalties, against the petitioner for the period from December 10, 1934, to December 31, 1935, under Local Law No. 20 of 1934 (published as No. 21), as amended by Local Law No. 24 (published as No. 25) for the City of New York.

Robert D. Steefel, Sol M. Stroock, Peter I. B. Lavan and *Bernard E. Brandes* for appellant.

William C. Chanler, Corporation Counsel (*Sol Charles Levine, Edmund B. Hennefeld, Jerome R. Hellerstein* and *Milton Sandberg* of counsel), for respondent.

CRANE, CH. J.

By Local Law No. 24 (published as No. 25) of 1934, enacted pursuant to authorization granted by the State Legislature (Laws of 1934, ch. 873), the city of New York imposes a tax of two percent upon receipts from every sale of tangible personal property sold within the city. The tax must be paid by the purchaser to the vendor, who is required to keep records and make a return to the Comptroller of his receipts and of the tax payable thereon. A sale is defined as any transfer of

title or possession, or both, for a consideration. A sale at retail is a sale for any purpose other than for resale. Although ordinarily the tax is collected by the vendor from the purchaser, the Comptroller may collect the tax directly from the purchaser. Where the vendor fails to collect the tax the purchaser is required to file a return and pay the tax directly to the Comptroller.

Sears, Roebuck & Co. has been required to pay a tax for the years 1934 and 1935 upon sales made at its stores in New York City, the goods or merchandise being sent from its warehouses or plants in other States. Payment has been resisted under the plea that such a tax is unconstitutional, as a burden upon interstate commerce. This tax has been sustained by the Appellate Division.

The petitioner conducts and operates nine retail stores within the city of New York. The principal office of the petitioner, which is a New York corporation, is at Chicago, Illinois. It has no factory or warehouse in the city of New York except a piano factory and except one warehouse in the borough of Brooklyn, which stores ready to wear suits, dresses, coats and other articles of clothing, piece goods, notions and other light merchandise. Sears, Roebuck & Co. maintains a control store at Philadelphia, Pennsylvania, which is a distributing plant for all of the New York stores and other stores in various parts of the east of the United States, and the executives at this control store have charge of and supervision over the New York stores. The company also maintains a factory at Port Newark, New Jersey, where there are manufactured and assembled bulky articles, such as mill work, roofer materials, heating equipment and the like. The articles involved on this review are described as "ship direct

orders." Certain articles which are large and bulky, or which must be assembled and put together before they are ready for delivery to the customer, are not kept in stock in the company's New York stores, but are kept either at the control store in Philadelphia, or are kept or manufactured upon order, at the factory at Port Newark, New Jersey. At Boston, Massachusetts, there is the Boston mail order control store.

The regional auditor gave the following testimony:

> "Q. When you make a sale or take an order for this type of merchandise do you have samples at your store? A. There are samples on display in the store and that is all that is in the store; because of the type of merchandise, it is entirely too bulky to carry it in the stores."

The practice, so the petitioner stated in its petition for review, is for a customer to come to one of the retail stores in New York City and order the merchandise in question. He is informed by the salesman that the merchandise is not kept in stock, but must be ordered from either Philadelphia or Port Newark, as the case may be. His order is taken and if it is a cash transaction, he pays his money, or, if it is a credit transaction, his credit is checked. A sales slip is made out, which states that the merchandise is to be shipped either from the Philadelphia control store or Port Newark direct to the customer at his home within the city of New York. A duplicate of the sales slip is sent to Port Newark or Philadelphia. The order is filled and is shipped by United States mail or by common carrier. The sample of sales slip, taxpayer's Exhibit No. 6, for horsehide coat, size 48, simply has writ-

ten diagonally across the bottom in lead pencil, "Slip from Phila control Stores." These sales slips are not signed by the purchaser.

Approximately eighty-five per cent of the sales at New York city stores are filled from a stock of merchandise kept in New York City. As to the remaining fifteen per cent, the goods are standard merchandise regularly carried in stock by the company as a retail dealer, none of which is manufactured to order, with the exception of mill work. At the nine retail stores during the period in question the appellant sold $2,750,857.99 worth of goods. Of these sales, $2,228,113.59 represented orders filled from stock kept in New York city stores or in the warehouse maintained in Brooklyn. The balance of $462,744.40 consisted of sales filled from stock held in warehouses maintained in Philadelphia, Port Newark or Boston.

The two percent tax on the sales of merchandise in the stores in New York City has been paid. This appeal involves solely the tax on the "shipped direct orders." All parties to the controversy concede that the contracts of sale or the sales were made in New York City. The delivery was made from the company's warehouse or control stores according to shipping directions directly to the purchaser's home.

When the purchaser entered one of the defendant's stores and made a contract to buy certain merchandise, according to the sample displayed, his purpose and object were to procure the article, irrespective of the place from which it was delivered. It made no difference to him whether it came from Philadelphia, Port Newark or Boston, as long as he got it on time and in good condition. The delivery from the warehouses of the appellant outside

the State was a matter of convenience or economy in the methods of conducting the appellant's business. It cannot be said that the shipments out of the State were one of the important features of the contract. It was incidental to the contract, the obligation of the defendant being to deliver the article purchased. From where it should come was a matter of its choice.

On these facts, has interstate commerce been burdened or interfered w h in such a way as to make this city tax upon the proceeds of these "shipped direct orders" unconstitutional? In the first place, Sears, Roebuck & Co. paid no more tax on these articles which it had delivered from its stores in Philadelphia or Port Newark or Boston than it paid on the goods sold and delivered from its nine stores in New York City. It paid no more tax than a seller would have paid or, to be more exact, a purchaser would have paid, if the goods had been purchased and delivered in New York City from any other vendor. There was here no discrimination against the interstate commerce or the shipment of goods from out the State. Neither could there possibly be any double taxation involved. The sale was complete in New York city; the price was to be paid in New York city; in every respect it was a New York State contract, governed by the laws of this State. The delivery of standard stock goods for the convenience of the seller was made from warehouses or storeplaces outside of the State. Under such circumstances, to permit Sears, Roebuck & Co. to evade this tax would really be a discrimination against people doing business within the city of New York with storehouses or mills there. Besides, if such sales were to go untaxed, a door would be open for an evasion, unfair indeed to those

who did not care to resort to such methods. Merchandise could be stored or kept outside the State and sold by sample within the State, without paying a tax. Not every merchant can afford such storehouses. No principle of interstate commerce forces us to such a conclusion. "Even interstate business must pay its way." (*Postal Telegraph Cable Co.* v. *City of Richmond*, 249 U. S. 252, 259).

The counsel have relied upon *Matter of National Cash Register Co.* v. *Taylor* (276 N. Y. 208). The sales there were made and consummated in Ohio where the company approved, accepted and executed the orders or sales. To the same effect was *Matter of West Publishing Co.* v. *Taylor* (276 N. Y. 535). The reasons and principles here expressed find their source, or, rather, their support, in such cases as *Adams Manufacturing Co.* v. *Storen* (304 U. S. 307); *Coverdale* v. *Arkansas-Louisiana Pipe Line Co.* (303 U. S. 604); *Western Live Stock* v. *Bureau of Revenue* (303 U. S. 250); *Henneford* v. *Mason Co.* (300 U. S. 577); *Wiloil Corp.* v. *Pennsylvania* (294 U. S. 169); *Monamotor Oil Co.* v. *Johnson* (292 U. S. 86); *Banker Brothers Co.* v. *Commonwealth of Pennsylvania* (222 U. S. 210).

The order should be affirmed, with costs.

LEHMAN, O'BRIEN, HUBBS, LOUGHRAN, FINCH and RIPPEY, JJ., concur.

Order affirmed.

(27389)

DEC 14

Supreme Court of the United States

No. 45. October Term, 1939.

JOSEPH D. McGOLDRICK, Comptroller of the City of New York,
Petitioner,

against

FELT & TARRANT MANUFACTURING CO.,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR PETITIONER

December 12, 1939.

WILLIAM C. CHANLER,
Corporation Counsel,
Counsel for Petitioner.

WILLIAM C. CHANLER,
EDMUND B. HENNEFELD,
JEROME R. HELLERSTEIN,
of Counsel.

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Supreme Court of the United States

No. 45. October Term, 1939.

JOSEPH D. McGOLDRICK, Comptroller of the City of New York,
Petitioner,

against

FELT & TARRANT MANUFACTURING CO.,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR PETITIONER

A writ of certiorari was granted by this Court on June 5, 1939, to review a final order of the Court of Appeals, affirming a final order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, which nullified the petitioner's determination that certain sales taxes were due and owing to him as Comptroller of the City of New York. The amount of the tax in controversy is $2,973.98, with interest, and the period embraced is December 10, 1934 to December 31, 1935 (R. 77-78).

The sole ground for the nullification of the petitioner's determination by the order under review was that the New York City sales tax law, as here applied, violated the Commerce Clause, Article I, Section 8, Clause 3, of the Federal Constitution (R. 92).

Opinions Below

The opinion of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department (R. 78), before which the proceedings to review the Comptroller's determination were heard in the first instance (New York Civil Practice Act, Art. 78), is reported in 254 N. Y. App. Div. 246 (1938).

The Court of Appeals wrote no opinion but said (R. 90):

> "Order affirmed, with costs, upon the authority of *Matter of National Cash Register Co.* v. *Taylor* (276 N. Y. 208).* No opinion."

This memorandum of decision is reported in 279 N. Y. 678, 18 N. E. (2d) 311 (1939). The supplemental memorandum on motion for reargument or amendment of remittitur, wherein the Court of Appeals added to the foregoing memorandum the words (R. 92),

> "and upon the sole ground that the City Sales Tax Law as here applied violates the commerce clause (Article I, Section 8, Clause 3) of the Constitution of the United States."

is reported in 280 N. Y. 689, 21 N. E. (2d) 198 (1939).

Jurisdiction

The writ of certiorari was issued pursuant to the power conferred on this Court by U. S. Code, title 28, §344, subsec. b. The decision below having sustained the claimed federal right, and the federal question being the sole ground of decision (R. 92), a case was made out within the cited statute for this Court to issue the writ.

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* Certiorari denied, 303 U. S. 656 (1938).

Specification of Errors to Be Urged

We respectfully submit that the Court of Appeals, in deciding the case in the manner indicated above, erred:

(a) In holding that the New York City sales tax as applied to the respondent's sales constituted an unconstitutional burden on interstate commerce.

(b) In holding that the sales which were the subject of the tax were contracts for interstate shipments, or otherwise required or necessarily involved interstate commerce, giving in so holding an erroneous interpretation of the case of *Wiloil Corporation* v. *Pennsylvania*, 294 U. S. 169 (1935).

(c) In regarding itself as compelled by the Commerce Clause to affirm the determination of the Appellate Division, and annul petitioner's determination of tax liability.

Statement of the Case

This case, involving as respondent the Felt & Tarrant Mfg. Co., does not differ in any material respect from *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U. S. 62 (1939). Not only does it involve the same taxpayer and the identical business methods, but the tax imposed is substantially the same in every material respect.

The respondent is an Illinois corporation engaged in manufacturing and selling comptometers and delivering them to purchasers in various States of the Union (R. 25, 31-32). Together with the Comptometer Company, its wholly owned subsidiary and agent (R. 52), it maintains in New York City offices, workrooms and stockrooms. There, it sells, rents, repairs and services comptometers and parts of comptometers. Its New York City selling staff consists of a general agent and numerous sub-agents

(R. 33). Only those New York City sales are in issue which are filled (*via* the New York City stockroom) from machines on hand in the Illinois factory (R. 25).

The respondent's products, comptometers, are standard machines of standard sizes, not specially built or manufactured to fill a particular order (R. 45, 59). They are of only two general types, hand-driven and electrically operated (R. 32, 45).

The respondent always has on hand in its New York City stockrooms between 250 and 300 comptometers (R. 32, 45), which, at an average value of $350 each (R. 53, 59), represent an inventory value of between $80,000 and $100,000. Despite these storage facilities, the respondent chooses not to fill its New York City orders from its New York stock, but adheres, instead, to the following procedure:

Orders taken by the New York City agents or subagents are sent by them to Chicago (R. 27). At respondent's insistence, the orders are required to be addressed to the Chicago office (R. 37). For reasons best understood by respondent, if the order comes addressed to the respondent at 299 Broadway, New York City, it is sent back to the customer with instructions to change it to show the Chicago address (R. 37).

The order specifies the quality, style, size, and price of the machine purchased (R. 53). It does not indicate where the machine is to come from (R. 53), nor is there any evidence that the customer has any knowledge where the machine will come from (R. 53). Since the respondent bears the shipping costs and risk of loss (R. 49), the customer actually purchases the machine "delivered".

All orders taken are subject to confirmation by respondent in Chicago (R. 28, 53). However, the procedure as

to confirmation appears to be largely ceremonial. Prices are fixed, not in Chicago but by the solicitors in New York, on the basis of a standard price list (R. 38, 57). The trade-in-value of old machines is fixed in New York (R. 56-57). There is no evidence that the Chicago office ever fails to confirm, nor is there any evidence that the customer is ever notified of confirmation. As a matter of fact, the order forms contain no space for confirmation (R. 53). The requirement of Chicago confirmation apparently serves no purpose other than to check inaccuracies in price quoting and to allow for additional credit checking (R. 38).

The respondent packs the machine in a carton and ships it, not to the customer, but to its New York City office (R. 39). The customer is not concerned at all with this shipment, is not the consignee, is not covered by the insurance, and, of course, does not pay the freight (R. 39, 49). The respondent must ship the comptometer to its New York workroom because the machine on its arrival in New York is frequently not in a deliverable state (R. 39). There is a "great deal of breakage" in transit which must be repaired in the New York workroom (R. 39). Even where there has been no breakage, testing, overhauling and adjusting must be done there (R. 39, 45). These activities of repair and adjusting often take three or four days, and it is not until they are completed that the New York office can make delivery to the customer (R. 47).

The respondent's obligations do not cease with delivery. Each contract of sale requires it, as an essential part thereof,

> "to keep the above Comptometer while in possession of (name of customer) in complete repair for

one year from date free of all charge for repairs" (R. 53).

In this connection, the respondent renders a free monthly service of "inspection, oiling, cleaning" (R. 34). When repairs or instalments of new parts are required, the work is done in New York (R. 44). While the machines are being repaired, repair loans are made of other machines from the New York stock (R. 47). During the first half of the tax period in question, respondent carried on this work of servicing and repairing directly, employing a staff of technicians for that purpose. In the second half, respondent organized a wholly-owned subsidiary, the Comptometer Company, to do the work (R. 34-35, 60, 51, 68).

Although respondent concedes that it makes a considerable number of local rentals and sales of parts which are taxable (R. 14A, 14B, 78), it has never qualified to do business in New York (R. 3-4, 31, 60). In June, 1935, its subsidiary, the Comptometer Company, received such authority (R. 60). But, both before and after the formation of the Comptometer Company, respondent engaged in concededly taxable local transactions (R. 68).

The Court of Appeals, by its amendment of the remittitur (R. 92) has indicated clearly that the tax assessment here involved is in entire conformity both with the New York City local law pursuant to which it was imposed (Local Law No. 20 of 1934, as amended), and the State enabling act pursuant to which the local law was enacted (New York Laws of 1934, ch. 873).

The New York City Sales Tax Law

This tax was first enacted on December 10, 1934, as part of a comprehensive program of tax measures* by which New York City was to finance its pressing emergency relief needs on a pay-as-you-go basis. It was enacted pursuant to emergency enabling legislation passed by the State legislature (Laws of 1933, ch. 815, effective Aug. 29, 1933, and amendments and renewals thereof). The enabling act declared that an emergency existed requiring the imposition of taxes "to relieve the people * * * from the hardships and suffering caused by unemployment and the effects thereof on the public health and welfare." It authorized the City of New York to "adopt and amend local laws imposing in any such city any tax which the legislature has or would have power and authority to impose." The revenues from the taxes were required to be used exclusively for emergency unemployment relief.

The tax imposed by the Local Law No. 20 of 1934, as amended, is limited to purchases for consumption. Purchases for resale are exempt under a definition of retail sale having that express purpose (§1g). A purchaser who has paid the tax and later resold may, upon filing a proper certificate of resale, obtain a refund of the taxes paid (§14).**

The sales tax applies with respect to the following kinds of purchaser-consumers (§2a, b, c and d):

---

* Certain of these measures were before this Court in *New York Rapid Transit Corp.* v. *City of New York*, 303 U. S. 573 (1938), where they were sustained as against asserted contravention of the Fourteenth Amendment.

** Under the New York City emergency relief business tax law, on the other hand, wholesale as well as retail vendors are taxed. Local Law No. 9 of 1934 and its successors.

1) Consumers of goods,* excluding food and drugs on prescription.

2) Consumers of utility services,** *i. e.*, gas, electricity, telephone, etc.

3) Customers in restaurants and cafes where the meals are over $1.***

The tax is imposed not on the seller† but on the buyer. The statute makes this abundantly clear and the Courts have so held. *Matter of Merchants Refrigerating Co.* v. *Taylor*, 275 N. Y. 113, 124 (1937); *Matter of Kesbec, Inc.* v. *McGoldrick*, 278 N. Y. 293, 297 (1938).

The statute provides that the tax is payable "by the purchaser to the vendor, for and on account of the city of New York" (§2). The vendor is liable for collection, filing of returns and payment over to the City and has "the same right in respect to collecting the tax from the purchaser, or in respect to non-payment of the tax by the purchaser, as if the tax were a part of the purchase price of the property or service" (§2). The vendor is required to state and charge the tax separately from the sales price (§2). Failure to do so or failure to collect the tax as such renders the vendor subject to criminal penalties. It is also a crime for the vendor to advertise that he is absorbing the tax (§§2, 15). Where the vendor fails to collect the tax, the purchaser-consumer is required within fifteen days

* The *vendors* of goods, on the other hand, are taxed under the New York City emergency relief business tax law. Local Law No. 9 of 1934, and its successors.

** The *vendors* of utility services are taxed under the New York City emergency relief utility tax law. Local Law No. 19 of 1933, and its successors.

*** The *restaurateurs* were liable for a business tax.

† No license is required of the seller, or of anyone else for that matter, as a condition of making the sale.

to file a return and pay the tax directly to the Comptroller, and the Comptroller is authorized to proceed directly against the purchaser for payment of the tax (§2).

Argument

POINT I

A State tax is void under the commerce clause only if in some way it interferes with the power of Congress "to regulate Commerce * * * among the several States." That is a question of fact.

The taxpayer claims that this tax violates the provision of the Constitution conferring upon Congress the power "to regulate Commerce * * * among the several States * * *." As this clause does not in terms limit the taxing power of the States, it is obvious that this can be so only if, as a matter of fact, the tax violates its purposes and intent.

The purpose of this clause was largely to prevent the States from favoring domestic industry as against the industries of other States, either by erecting tariff barriers or by other forms of regulation or taxation, and thus stifling the growth of a national economy based upon the principle of free trade among the States (*Baldwin* v. *G. A. F. Seelig*, 294 U. S. 511, 523 [1935]). The evils of local tariff barriers were very much in the minds of the framers of the Constitution; for they were fully aware of the many examples of those evils presented not only by the acts of the various States under the Articles of Confederation, but by contemporary Europe, and were determined to prevent their continuance in this country.

The wisdom of their decision has been overwhelmingly demonstrated by its results.

At the same time, it was not the purpose of that section to interfere with the right of States, subject to this limitation, to impose taxes to meet their own needs. As Alexander Hamilton said in the Federalist No. XXXII:

> "I am willing here to allow, in its full extent, the justness of the reasoning which requires that the individual States should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants. And making this concession, I affirm that (*with the sole exception of duties on imports and exports*) they would, under the plan of the convention, retain that authority in the most absolute and unqualified sense; and that an attempt on the part of the national government to abridge them in the exercise of it, would be a violent assumption of power, unwarranted by any article or clause of its Constitution." (Italics ours.)

It is our contention that these principles form the basis of all the decisions of this Court dealing with State taxes under the Commerce Clause. As we shall point out hereafter, the Court has invariably upheld a State taxing statute unless it found either that the tax interfered in some manner with the free flow of interstate commerce, by subjecting it to a greater burden than would result if interstate commerce were not involved, or that it interfered in some way with the exclusive right of Congress to regulate that commerce. The Commerce Clause does not entitle interstate merchants to a "free ride" at the expense of their local competitors; nor does it permit them to carry on their business without paying any part of the expense of the local governments that protect the various phases of their activities.

A very recent expression of this principle is to be found in the case of *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938), at p. 258, where the Court said:

> "But we think the tax assailed here finds support in reason, and in the practical needs of a taxing system which, under constitutional limitations, must accommodate itself to the double demand that interstate business shall pay its way, and that at the same time it shall not be burdened with cumulative exactions which are not similarly laid on local business."

It is evident from a mere statement of this proposition that its application must be based upon factual rather than legal considerations. The Commerce Clause does not in terms limit the taxing power of States. It is only because the Court has found that in certain instances certain statutes as a matter of fact interfered with the right of Congress to regulate commerce that such taxing statutes have been invalidated.

It follows that each statute must be judged upon its own facts. To seek to determine whether or not one taxing statute constitutes an unconstitutional regulation of or interference with interstate commerce by citing formulae alleged to have been laid down by the Court in passing upon another, which may have presented an entirely different state of facts, will inevitably lead to wholly improper and unjustified results. And so this Court has consistently held.

> "No formula has yet been devised by which it can be determined in all cases whether or not such a tax [affecting interstate commerce] is valid, and, applying the repeated declaration of this court, in the cases cited and in many others, * * * the

question is inherently a practical one, depending for its decision on the special facts of each case * * *"

Hump Hairpin Co. v. *Emmerson*, 258 U. S. 290, 295 (1922).

"Discrimination like interstate commerce itself, is a practical conception. We must deal in this matter, as in others, with substantial distinctions and real injuries."

Gregg Dyeing Co. v. *Query*, 286 U. S. 472, 481 (1932).

"Practical rather than logical distinctions must be sought."

Western Live Stock v. *Bureau of Revenue*, 303 U. S. 250, 259 (1938).

The Constitutional principle is comparable with that presented by the inter-governmental instrumentalities tax cases. There again, the taxes are not expressly prohibited by the Constitution. Their validity or invalidity depends solely upon an analysis of the facts. Is the tax in fact an interference by one government with the lawful governmental activities of the other?

"* * * the only possible basis for implying a constitutional immunity from state income tax of the salary of an employee of the national government or of a governmental agency is that the economic burden of the tax is in some way passed on *so as to impose a burden on the national government tantamount to an interference by one government with the other in the performance of its functions.*" (Italics ours.) *Graves* v. *New York ex rel. O'Keefe*, U. S. , 83 L. Ed. 577 (1939).

So here the only possible basis for implying a constitutional immunity from State tax is that the burden of the tax in some way imposes a burden on interstate commerce tantamount to an interference by the State with that commerce. That is a question of fact.

POINT II

This Court has recently sustained a State tax in a case involving this very respondent, under circumstances identical in every respect with those here presented.

As we have seen, the sole question in this case is whether upon a factual analysis it can be found that the tax in question interferes with the power reserved to Congress to regulate interstate commerce.

In the briefs submitted by us in the companion cases of *McGoldrick* v. *Compagnie Generale Transatlantique*, *McGoldrick* v. *Berwind-White Coal Mining Co.*, and *A. H. DuGrenier Inc.* v. *McGoldrick*, to be argued herewith, we discuss at length the general principles laid down by this Court in dealing with this subject. As will more fully appear from that discussion, this Court has never invalidated a State taxing statute unless it was found that as a matter of fact it subjected interstate commerce to a greater burden, or to the danger of a greater burden, than would arise if the commerce were not being done. As we further point out in those cases, the tax at bar is valid because it does not subject interstate commerce to such a burden, or to the possibility of such a burden. Copies of these briefs will be furnished to counsel in this case. Suffice it for the present to point out that this Court has

very recently sustained a tax identical with the tax at bar in every factual respect, in a case involving this very respondent, and this very method of selling and delivering goods across State lines. *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U. S. 62 (1939).

The facts in the California case are set forth in the opinion of this Court (306 U. S., at pp. 64-66) in the following language:

> "It appears—
>
> Appellant, an Illinois corporation, is engaged in manufacturing and selling comptometers in that state and delivering these to purchasers in various parts of the Union. As stated by the court below its method of doing business with respect to California purchasers is substantially as follows:
>
> 'Pursuant to a separate contract made with each, the exclusive right to solicit orders in California is granted to two general agents, each of whom is allotted a separate section of the State. Under this contract the only compensation paid to a general agent consists of commissions on sales made. Each general agent may employ subagents and also a demonstrator for the purpose of demonstrating and instructing respecting the comptometers, provided such employment is approved by plaintiff. Likewise, plaintiff agrees by this contract to pay the rent of an office for each general agent, provided the lease to the same has been approved by it, such office to be used exclusively in furthering its business; also agrees to pay part of the traveling expenses incurred by each general agent, his subagents and demonstrators while traveling on business trips authorized by plaintiff, and also to reimburse each general agent to the extent of part of the monies advanced to a subagent and, in addition, in the amount of $40.00 per

month toward the salary of a demonstrator. Plaintiff assumes no other financial obligation with respect to subagents and demonstrators. Under this contract the general agent must devote his entire time and attention to soliciting orders for plaintiff. All orders taken must be submitted to and approved by plaintiff, all sales and deliveries must be made by, and all bills for such orders as are accepted must be rendered by, the plaintiff. The general agent is prohibited from making collections and all payments must be made directly to plaintiff. The contract further requires the general agent to maintain certain records, and make certain reports and make a specified minimum number of calls on prospective customers.'

And further 'That each of these two general agents maintains an office in this state, the lease to such office designating the plaintiff as lessee therein, the rent for the same being paid by plaintiff, while all other expenses of maintaining such office are paid by the general agent. As soon as an order is accepted a particular machine is appropriated for that purpose in plaintiff's shipping department in Illinois. All machines sold for delivery in California are shipped from one of plaintiff's distributing points outside of the state. Sometimes machines are forwarded directly to the purchasers, while in other instances, in order to secure reduced freight charges, large groups of machines are shipped to the general agent who makes delivery to the respective purchasers. The only machines kept by plaintiff in California are those used as demonstrators. Plaintiff has never qualified to do intrastate business in California'."

That this statement of facts is applicable in every detail to the facts at bar is evident from the statement of facts at pages 3 to 6, *supra*. It is further apparent in

greater detail by reference to the following pages of the record in this case: 25, 28, 31, 32, 33, 39, 53, 54, 56, 57, 58, 60. If any further evidence were required as to the factual similarity between the two cases, we respectfully refer the Court to the taxpayer's own statement of facts as contained in its petition at bar (R., pp. 3, 5-6).

So much for the identity of business procedure. The following tabular comparison will show the factual identity of the two taxes.

California Tax	New York City Tax
1. The tax is imposed on the purchaser at retail of merchandise purchased for consumption and not for resale.	1. The tax is imposed on the purchaser at retail of merchandise purchased for consumption and not for resale.
2. The tax is a given percentage of the sales price.	2. The tax is a given percentage of the sales price.
3. The tax is paid by the purchaser at the time of the sale.	3. The tax is paid by the purchaser at the time of the sale.
4. The vendor is directed to collect the tax and to state and charge it separately, and is forbidden to absorb the tax, all under pain of criminal penalties.	4. The vendor is directed to collect the tax and to state and charge it separately, and is forbidden to absorb the tax, all under pain of criminal penalties.
5. The tax is collected by the vendor, who files the returns.	5. The tax is collected by the vendor, who files the returns.
6. If the tax is not collected by the vendor, it is payable directly by the purchaser to the taxing official.	6. If the tax is not collected by the vendor, it is payable directly by the purchaser to the taxing official.
7. The tax law requires the vendor to insure payment of the tax if he fails to make the collections from the taxpayer.	7. The tax law requires the vendor to insure payment of the tax if he fails to make the collections from the taxpayer.

Thus, factually, the two taxes are identical. How, then, can one interfere with interstate commerce, while the other does not?

Our adversaries will no doubt argue that one is called a "use" tax and the other, a "sales" tax; that the taxable event in one is described as "the exercise of any right or power * * * incident to the ownership of the property" other than resale (Cal. Laws of 1935, ch. 361, as amended by Laws of 1937, chs. 401, 671 and 683), whereas in the other the taxable event is the "transfer of title or possession or both" for any purpose other than resale.

But this is a difference in words, not a difference in substance. As was recently stated by this Court in *Southern Pacific Co.* v. *Gallagher,* 306 U. S. 167 (1939), at p. 177:

> "State taxes upon national commerce or its incidents do not depend for their validity *upon a choice of words* but upon the choice of the thing taxed." (Italics ours.)

A comparison of the respective statutory definitions of "use" and "sale" makes it evident that "the thing taxed" is in substance identical: the California levy, like the tax at bar, is in fact imposed upon purchases for consumption.

The California law defines "use" as follows:

> "'Use' means and includes the exercise of any right or power over tangible personal property incident to the ownership of that property" except sales of property in the regular course of business. (Sec. 2[b]).

The New York City definition of "sale" in so far as relevant to the cases at bar is as follows:

> "The word 'sale' * * * means any transfer of title or possession or both * * * for a consideration" (sec. 1[e]).

In *Southern Pacific Co.* v. *Gallagher, supra,* the Court has upheld the California tax as applied to the sale and delivery of goods to the purchaser across State lines, even though the goods were consumed in interstate commerce immediately after their receipt by the purchaser. In short, the tax was imposed upon the transfer of the property to the railroad company in California. The New York City sales tax is imposed upon precisely the same activity—the transfer of the comptometer to the customer in New York City.

It is apparent that both the California and the New York taxes are upon the consumer based upon his acquisition of property for consumption. The New York tax is as much a "use" tax as the California tax, and the California tax is as much a "sales" tax as the New York tax. Both are taxes on the consumer; both require collection by the vendor, and both are otherwise identical in substance and procedure.

It is clear that *this* taxpayer could be compelled to pay *this* tax upon *these very transactions*, had these transactions taken place in California under the California use tax statute. How can the imposition of that tax violate the Commerce Clause, when imposed in New York City under the New York City sales tax?

It is true that if the New York tax is held void, interstate commerce will flow more freely in New York than in California, for obviously every New York purchaser will seek to buy his goods only from those vendors who are able to store their goods in another State and make shipment across State lines. If it be the purpose of the

Commerce Clause to subsidize interstate commerce to the point of destroying local business, then indeed this tax should be held invalid. But certain it is that if it be sustained, interstate commerce will be no worse off in New York than it is in California. No New Yorker will favor interstate shipments less because the tax is called a "sales" tax, and is described in a statute which he has never seen as being imposed upon his acquisition of the property for consumption, than he would if the tax were described as a "use" tax and imposed upon his receipt and retention of the property for consumption.

It takes more than dialectics to change the course of interstate commerce.*

POINT III

Upon the facts, this case is indistinguishable from the recent case of *Graybar Electric Co.* v. *Curry*.

The case of *Graybar Electric Co.* v. *Curry*, 308 U. S. , Dec. 4, 1939, arose under the Alabama sales tax, a mandatory consumer's sales tax of precisely the same nature as the New York City tax (189 So. 186).

Like the respondent, the taxpayer in that case was a foreign corporation, with its principal place of business outside the taxing State. Like the respondent, it main-

* We may mention in passing, recognizing its limited pertinence, that the respondent's objection to the tax is narrower than the claim that the City sales tax may not be imposed here at all. The respondent apparently acknowledges the right of the Comptroller to collect the sales tax from its customers as purchasers, and contends only that the Comptroller has no right to require the respondent to collect the tax as vendor (Respdt's Br. in Opp. to Cert., pp. 9-10). Of course, the decisions of this Court dispose completely of this contention. *Felt & Tarrant Mfg. Co.* v. *Gallagher, supra.*

tained a divisional office in the taxing State for the solicitation of local sales. Like the respondent, it carried a small quantity of standard goods in stock, filling its orders chiefly by shipment from out of the State. Also like the respondent, it objected to the imposition on it of the duty to collect the tax from its local customers on sales filled by such shipments.

The interstate shipments in the *Graybar* case fell into four classifications, denominated in the State Court's opinion as Classes A to D.

Class C presents a situation identical with that at bar. In this category are the shipments by the taxpayer from its own out-of-State warehouses of goods not carried in stock in the taxing State.

Class A presents a situation even stronger for the taxpayer than that at bar. Under this heading are all sales in which the taxpayer was required by contract to deliver goods "manufactured at the plant of the General Electric Company located in the State of Ohio and shipped in interstate movement from said plant" to Alabama. Some of the goods had to be built to the customer's specifications at the Ohio plant. Most of them were for goods not carried in stock within the taxing State.

While perhaps no one of the four methods of doing business passed upon by the Court in that case is in every essential identical with that at bar, as a group they present every factual situation here involved. We think the cases are substantially identical from that factual standpoint.

Even if it be thought that the case at bar can be distinguished from the use tax cases, it must in any event be sustained on the authority of the *Graybar* case: The

burden is the same; the incidence is the same; the method of collection is the same; and the taxable event is the same. If one does not infringe upon the Commerce Clause, the other cannot. We think that in each case "The act lays no burden on interstate commerce as such, and if any can be said to result from the imposition, *it is indirect and precisely as that which would have resulted if deliveries had been made exclusively by intrastate transportation* • • •" (*Wiloil Corporation* v. *Pennsylvania*, 294 U. S. 169 [1935]).

Conclusion

The entire tax situation at bar is so similar to that involved in *Felt & Tarrant Mfg. Co.* v. *Gallagher, supra*, that unless the mere name of the tax is to be regarded as controlling, the tax at bar should be upheld. "To hold that there is a constitutional barrier to the tax sought to be imposed would be to make a fetish of form. It would make the decisions of this Court on the constitutional power to tax devoid of any reason or function apart from a ritual of tax avoidance." (*Pearson* v. *McGraw*, 308 U. S. [December 4, 1939].) But even if this tax were different, we respectfully submit that, like the tax in the *Graybar* case, it must be sustained, because upon a factual analysis it is clear that it does not subject interstate commerce to a greater burden, or to the danger of a greater burden, than would result if the goods were delivered from a point within the State.

The final order and judgment should be reversed and petitioner's determination confirmed.

December 12, 1939.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1939.

JOSEPH D. McGOLDRICK, Comptroller of the City of New York,
Petitioner,
against
FELT & TARRANT MANUFACTURING CO.
No. 45.

JOSEPH D. McGOLDRICK, Comptroller of the City of New York,
Petitioner,
against
A. H. DuGRENIER, INC., Principal, and STEWART & McGUIRE, INC., Agent.
No. 474.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

REPLY BRIEF FOR PETITIONER.

January 2, 1940.

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ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

REPLY BRIEF FOR PETITIONER.

We believe that in our principal briefs in the *Berwind-White* case and the cases at bar and in our reply brief in the *Berwind-White* case, we have sufficiently met the major contentions made by the respondents. However, the respondents in the cases at bar have raised several additional points, not raised in the *Berwind-White* case, with which we now propose to deal.

POINT I.

The fact that the orders for the goods involved in these two cases may have been accepted at the home office of the sellers in other States, does not subject the transactions to a greater burden, or to the danger of a greater burden, than that borne by local transactions.

Respondent in each of these cases urges that the cases can be distinguished from the two companion cases of *Berwind-White* and *Compagnie Generale Transatlantique* because in these cases it is claimed that the orders solicited by the respondents' agents in the City of New York did not ripen into contracts until they had been sent to the home office of the respondent and there accepted.

As is apparent from an examination of the statements of fact set forth in our principal briefs in each of these cases, this circumstance is merely one adopted for the convenience of the seller. The purchaser obviously does not care where the order is accepted. If the fact that the order is accepted in another State might subject the seller to any greater burden of taxation than would result if the order were accepted in the home State, this is so only by reason of its own choice. It could just as easily, after approving the proposed contract, return it to its agent for formal acceptance in New York. It cannot, therefore, complain if, by reason of the particular method by which it chooses to carry on its business, it might be subjected to additional taxation in the States of Massachusetts or Illinois (*Wiloil Corporation* v. *Pennsylvania*, 294 U. S. 169 [1935]). Furthermore, to permit respondents to avoid this tax by the mere device of sending pieces of paper across State

lines with particular notations inscribed upon them, opens the door wide to wholesale tax evasion and accomplishes no beneficial purpose in protecting interstate commerce. Obviously, the course of commerce is not going to be changed by the form of the sales slips or orders adopted by these sellers in carrying on their business.

But even if for some reason it were necessary for the seller to have the orders sent to its factory to be accepted, we do not see that this circumstance would subject the seller to the danger of any greater tax burden than that borne by transactions containing no such interstate features. The argument of respondent Felt & Tarrant is that it may be subjected to a gross receipts tax in the State of Illinois. We think we have dealt sufficiently with that proposition in our reply brief in the *Berwind-White* case.

But respondent DuGrenier urges that its case is stronger for the taxpayer than the *Berwind-White* case for the reason that "here the contract of sale was made in Massachusetts and it is beyond the possibility of dispute that it would be taxable there" (Br., p. 11). Counsel leaves this bare statement unsupported by argument or precedent. It seems to us that the proposition is far from clear.

Counsel say that this is "the type of case of interstate commerce" (Br., p. 10). In our view, so far as the tax upon the making of the contract is concerned, it is the type case for the application of the rule against multiple taxation. The order is made in one State and the acceptance takes place in another. Neither activity has any realistic physical relationship to any locality. The purchaser might send his order by mail directly to Massachusetts instead of delivering it to the seller's local

agent in New York, as in the case at bar; or the seller might send the order back to its agent in New York, with its approval, to be accepted in New York by its agent. All of these are common business practices. No part of the making of the contract has any inherently local attributes. While no such case has been presented to the Court, and it is hard to tell, in the absence of a concrete factual situation, where the burden of the tax might lie, we think it is very questionable whether such a tax, at least if unapportioned, would be sustained. But certainly if its effect is, as feared by respondent, to produce multiple taxation, it will be held invalid, at least unless apportioned; and we think the decisions of this Court indicate that this would probably be the result.[1]

As we point out at greater length in our reply in the *Berwind-White* case, copies of which will be furnished to counsel in these cases, it is our view that the rule against multiple taxation has application only to a case where the validation of a particular tax would necessarily compel the validation of an identical tax upon the identical counterpart of the identical transaction when imposed by another State. It is further our contention that the fact that some different tax might be imposed upon a different taxpayer and upon a different phase of the same transaction by another State, does not subject interstate commerce to the danger of a burden of multiple taxation

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[1] It should be pointed out that by administrative interpretation and by decision of the State court, mere contracts of sale or the transfer of title without transfer of possession are not taxed. *Matter of Gunther's Sons* v. *McGoldrick*, 279 N. Y. 148 (1938). The tax is imposed only upon local transfers of title and possession to purchasers. The intimations to the contrary in the brief of respondent for the *Berwind-White Coal Mining Company*, page 36, are erroneous.

not borne by local commerce. The reason is that if such tax is valid its burden exists independently of the imposition of the tax at bar, and is a burden which will be equally borne by local commerce.

This proposition is well illustrated in the case at bar. If such a tax may be validly imposed by the State of Massachusetts, then obviously it can be imposed whether or not there exists such a tax as the New York City sales tax. Respondent's goods are subject to the burden of that tax, if it be a burden, irrespective of the tax at bar. The imposition of the tax at bar, therefore, which is borne equally by local sales, cannot increase the burden of respondent's interstate sales.

Furthermore, if the tax is valid, an identical tax can be imposed upon the making of all contracts for local sales by local sellers, in the State of New York. In other words, the burden of the Massachusetts tax bears no relation to the tax at bar and, if it exists at all, is one borne equally by local commerce.

If counsel for respondent DuGrenier share the fear of counsel for *Berwind-White*, that a decision of this Court validating the tax at bar would result in validating the imposition by the State of Massachusetts of an otherwise invalid unapportioned tax upon the making of this contract, we can only say that we can find no possible basis in logic or law for such a proposition.

Of course, an apportioned tax on the making of contracts would be identical in effect with an apportioned gross receipts tax. Each State where some part of the activity took place could impose an apportioned tax upon the transaction, and local transactions would bear the same burden as interstate transactions.

POINT II.

The contention that the tax at bar violates the enabling act, which is purely a question of State law, has already been rejected by the State Court.

The respondents contend that the tax at bar violates the enabling act, pursuant to which the sales tax law was adopted by New York City. They assert that because the enabling act restricts the City's power to levy taxes to "the territorial limits" of the City and does not permit the imposition of any tax "on any transaction originating and/or consummated outside the territorial limits of any such city" (Laws of 1934, ch. 873, sec. 1, Appendix B of Appendix of Statutes), the taxes at bar must be invalidated. This question of State law has already been decided against the respondents in the Court of Appeals, which invalidated the assessments solely on the ground that they violated the Commerce Clause. No such contention is therefore open to the respondents. Accordingly, there is no basis for the request that the cases be remanded.

Conclusion.

The final orders and judgments should be reversed and petitioner's determinations confirmed.

January 2, 1940.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 944 15

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, *Petitioner*,

v.

FELT & TARRANT MFG. CO.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New York.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

NEWTON K. FOX,
Attorney for Respondent.

May, 1939.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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OCTOBER TERM, 1938.

No. 944.

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, *Petitioner.*

v.

FELT & TARRANT MFG. CO.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New York.

BRIEF IN OPPOSITION.

OPINIONS BELOW.

The memorandum opinion of the Court of Appeals is reported in 279 N. Y. 678, 18 N. E. (2d) 311, and the opinion of the Appellate Division is reported in 254 App. Div. 246, 4 N. Y. S. (2d) 615.

JURISDICTION.

The jurisdiction of this Court is involved under Section 237 of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Are sales of goods manufactured in Chicago, Illinois, by an Illinois corporation, which is not authorized to do business in the State of New York, subject to the New York City "Sales Tax" where the order for the goods must be and is approved in Chicago, the goods are appropriated to the order in Chicago, and are then shipped in interstate commerce to the customer in New York City?

STATUTES INVOLVED.

Laws of the State of New York, Chapter 873 of the Laws of 1934, as amended. (Cahill's Consolidated Laws of New York 1931-1935 Supplement, page 798).

New York City "Sales Tax", Local Law No. 20 (published as No. 21, p. 143) as amended by Local Law No. 24 (published as No. 25, p. 164) of the Laws of 1934 of the city of New York.

New York City "Personal Property Tax", Local Law No. 25 of 1934, No. 31 of 1935, No. 28 of 1936, No. 21 of 1937, No. 28 of 1938 of the city of New York.

Pertinent excerpts are found in the "Appendix" hereto, A, B, and C.

STATEMENT.

This case involves a New York City "Sales Tax" illegally collected from an Illinois manufacturer, not qualified to do business in the State of New York, on sales in interstate commerce.

The taxpayer, Felt & Tarrant Mfg. Co. is a corporation organized under the laws of the State of Illinois. Its factory and principal office and place of business is located in Chicago, Illinois. It is engaged in the business of manufacturing and selling adding and calculating machines known as "Comptometers". (R. 3, 25, 32.)

The taxpayer is not authorized or licensed to do business in New York State. (R. 3-4, 31, 60.)

All manufacturing is done at Chicago, Illinois (R. 32). The Company has *no* manufacturing plant in the State of New York (R. 25); *no* warehouse or other depository in the State of New York (R. 28) and *no* stock of machines on hand in New York City from which sales are made. (R. 28, 32, 45, 46.)

The Company employs a principal and sub-solicitors to solicit orders for comptometers from customers in the City of New York (R. 33). Solicitors operate under a written agreement with the Company (Exhibit 2, R. 54-58). Under the terms of the agreement the duties of solicitors are restricted *solely* to the solicitation of orders. (Ex. 2, par. 1, R. 56-57.) Solicitors have no power to accept an order (R. 39) or to collect money for an order. (Ex. 2, par. 5, R. 57.)

The Company uses a standard form of order blank (R. 26-27); (Exhibit 1, R. 53.) All orders must be addressed to "Felt & Tarrant Mfg. Co., Chicago, Illinois" (R. 37, Exhibit 1, R. 53) and on the face of the order blank is printed: "All orders subject to the acceptance of an officer of the Company in Chicago". (R. 53.) All orders received must be approved by an officer of the Company, at Chicago, Illinois, and an order cannot be filled without such approval. (R. 27-28, 39, 40.)

After approval the order goes to the Billing Department, at Chicago, where an order is made out on the Shipping Department, at Chicago, Illinois, for the shipment of a comptometer. (R. 27, 29, 30, Exhibit A, R. 58.) A comptometer is then allocated, by Serial Number, to the order by the Shipping Department, at Chicago, and the individual Serial Number of the Comptometer, so appropriated to the order, is inserted in the upper right-hand corner of the shipping order. (R. 27, 30, Exhibit A, R. 58.) The complete, assembled, machine is then packed in an *individual carton* for shipment to the purchaser. (R. 39.) The shipping order, at Chicago, is then turned over to the Billing Department, at Chicago, where an "Invoice" is made out at Chicago, for the specific "comptometer" by Serial Number of

the machine appropriated to the individual customers's order. (R. 30, Exhibit B, R. 59.)

The invoice is mailed from Chicago to the customer showing the Serial Number of the specific Comptometer shipped. (R. 30, Exhibit B, R. 59.) The Invoice states on its face: "Make All Checks Payable to Company—Remit Directly to Chicago". (R. 59.)

All remittances are sent direct to Chicago and all collections are made at Chicago, Illinois. (R. 30.) *No* billings are sent from and *no* collections are made in New York City. (R. 30.)

The comptometers are shipped in interstate commerce by common carrier, express, freight or motor service to the customer (R. 28, 41) packed in individual separate cartons. (R. 39.)

No Comptometers at the New York office are available for sale. (R. 28, 32, 38, 40, 45, 46.) The Comptometers at the New York office are used only for repair loans and demonstrations (R. 37, 40, 47, 48). These machines are *never* sold to customers in New York City. (R. 32, 37-38, 45, 46, 47.)

Comptometer Company, a Delaware Corporation, and a subsidiary of taxpayer, is authorized to do business in the State of New York. (R. 60.)

Servicing of the comptometers under the one year guarantee and repairs to machines after the guarantee period had expired, were until August 31, 1935, performed by Felt & Tarrant Company, and after that time they were performed by Comptometer Company. (R. 33-34, p. 14c, Doc. No. 3.)

Sales tax returns have been filed and New York City "Sales Taxes" have been paid on all charges for repair work and services to Comptometers performed in New York City and for all local sales of parts and local rental of machines during the taxable period in suit. (R. 40-41, 51.)

The Comptroller of the City of New York assessed additional "Sales Taxes" and interest of $3,122.53 against Felt

& Tarrant Company on alleged taxable sales (R. 72-73); the assessment was involuntarily paid under protest and duress (R. 8-9); application was filed for a refund of the taxes and interest paid (R. 10-11); and refund was denied. (R. 74-75.)

An order of certiorari was granted by the Supreme Court, New York County, to review the determination of the Comptroller. (R. 2-3.)

The Appellate Division, First Judicial Department, sustained the order of certiorari and annulled the determination of the Comptroller in the sum of $2,973.98, the taxpayer having admitted that an additional tax of $148.55 was due for rental of machines to the Comptometer Company and on sales of parts. (R. 76-80.)

The Court of Appeals affirmed the Appellate Division on the authority of its prior decision in *Matter of National Cash Register Co.* v. *Taylor*, 276 N. Y. 208. (R. 90.)

The Comptroller has filed a petition for a writ of certiorari.

SUMMARY OF THE ARGUMENT.

This is a "Sales Tax" case in which this Court has already denied petitions for certiorari in New York cases involving the same issues and facts.

The New York City "Sales Tax" is restricted by the Enabling Act to "Local" sales. Sales in interstate commerce are expressly exempted. Exterritorial sales are not subject to the tax.

Under the New York City "Sales Tax" and "Personal Property Tax" the City can lawfully collect these taxes from the purchaser instead of unlawfully collecting them from the Illinois manufacturer.

There is no discrimination against New York manufacturers or merchants by invalidating these taxes because the articles are patented and sold exclusively by the Illinois Company. They cannot be and are not sold by any other person in New York City or in the United States.

Taxation of these sales by the City of New York is a burden on interstate commerce under the decisions of this Court.

A "Sales Tax" and a "Use Tax" differ fundamentally. There is no conflict between the decisions of the courts below and the decisions of this Court in the "Use", "Privilege", "Excise", "Sales", "Personal Property" and "Gross Receipts" tax cases.

There is no conflict in the State Court decisions.

The petition should be denied.

ARGUMENT.

I. Petitions for Certiorari Were Denied by this Court in Similar New York Cases.

The Court of Appeals of New York has construed the Local Laws, passed by the City of New York, and has held that, under the facts of this case, the "Sales Tax" does *not* apply to the sales made by the Respondent.

This Court has already denied petitions for certiorari (303 U. S. 656) in cases involving the same question and substantially the same facts in *McGoldrick, Comptroller* v. *National Cash Register Co.*, 303 U. S. 656 (276 N. Y. 208, sub. nom., Matter of National Cash Register Co. v. Taylor, Comptroller), and *McGoldrick, Comptroller* v. *West Publishing Co.*, 303 U. S. 656 (276 N. Y. 535, sub. nom., Matter of West Publishing Co. v. Taylor, Comptroller.

The Court of Appeals decided the case at bar on the authority of *Matter of National Cash Register Co.* v. *Taylor*, 276 N. Y. 208, certiorari denied, 303 U. S. 656. So did the Appellate Division of the Supreme Court. Those courts held, on the particular facts involved, that the tax herein was erroneously collected from the manufacturer.

The Courts below followed the principles established by the decisions of this Court in *Crew Levick* v. *Pennsylvania*, 245 U. S. 292; *Chevey Bros. Co.* v. *Massachusetts*, 246 U. S. 147; *Stewart* v. *Michigan*, 232 U. S. 665; *Dozier* v. *Alabama*,

218 U. S. 124; *Brennan* v. *Titusville*, 153 U. S. 289; *Crenshaw* v. *Arkansas*, 227 U. S. 389; *Rearick* v. *Pennsylvania*, 203 U. S. 507; *Caldwell* v. *North Carolina*, 187 U. S. 622; *Helson* v. *Kentucky*, 279 U. S. 245; *State Tax Commission* v. *Gas Co.*, 284 U. S. 41; *Cooney* v. *Mountain States T. & T. Co.*, 294 U. S. 384.

II. This Case Involves a "Sales Tax" Imposed Upon and Collected from a Manufacturer of Goods Shipped in Interstate Commerce and Therefore Violates the Commerce Clause of the Constitution.

The enabling Act, Chap. 873 of the Laws of New York of 1934 (Appendix A), restricted the power of the City to the taxation of purely "local" sales.

Section 1 provides:

> "A tax imposed hereunder shall have application only within the territorial limits of any such city."
> * * *

And it provides:

> "This act shall not authorize the imposition of a tax on any transaction originating and/or consummated outside of the territorial limits of any such city, *notwithstanding that some act be necessarily performed with respect to such transaction within such limits*". (Italics ours)

The City "Sales Tax" Law expressly exempts sales in interstate commerce (Appendix B).

Section 2 provides:

> " * * * receipts upon which the state of New York and city of New York are by virtue of the provisions of the constitution of the United States or otherwise without power to impose a tax shall not be subject to tax hereunder".

New York City may not, under these laws, tax exterritorial sales effected outside of the territorial limits of

the city. The courts below held the sales in the case at bar were not local and were not subject to the tax.

In the case at bar the sales were consummated in Chicago, Illinois, the specific goods were appropriated to the sales in Chicago, and the goods were then shipped in interstate commerce. The City cannot exert its taxing powers extraterritorially or tax sales in interstate commerce.

As was said by the Court of Appeals in the case of *Matter of National Cash Register Co.* v. *Taylor*, 276 N. Y. 208, at pp. 213-214:

> "* * * The rule formulated and applied in these cases brings within the taxing power of the State the products of the petitioner held in stock in New York for sale. A tax imposed by the State on the sale of goods produced here and goods imported from other States is valid. However, the goods delivered under a 'special order' were not within the State when the order was given. The contract of sale did not become effective until the order given in New York was accepted in Ohio; the goods sold were manufactured in Ohio; they were appropriated to the contract of manufacture or sale in Ohio; they were never held here at the pleasure of the seller for disposal or use; they were sent to the office here of the seller only for delivery to the buyer and as a convenient step in the transportation from the factory of the seller outside the State to the buyer here."
>
> "* * * Here, on the contrary, the contract made outside the State called for the delivery of goods which were manufactured outside of the State and which could not be procured within the State."

III. This Case Involves no Question of General Law, Nor is the Question One of Substance or Importance.

"Sales Tax" cases raise factual questions. This case turns upon the application of a local City "Sales Tax" law to the particular facts of this case, namely, was there a local, taxable sale.

Every "Sales Tax" case depends upon its particular facts, the decision in one case is not controlling in another case where the facts differ.

No important question of general law is raised nor is the question one of substance, general importance or public interest.

Compare, *Bacon & Sons* v. *Martin*, 305 U. S. 380, 381, where this Court dismissed the appeal for want of a substantial federal question. Compare, *Matter of Sears, Roebuck & Co.* v. *McGoldrick*, 279 N. Y. 184, where the Court of Appeals of New York held, under different facts and circumstances, that the New York City Sales Tax was applicable and the sales made were taxable.

IV. The New York City "Sales Tax" and "Personal Property Tax" Permit the City to Lawfully Collect the Taxes in the Case at Bar from the Purchaser as Opposed to an Unlawful Collection from the Manufacturer.

The case at bar relates entirely to "Sales Taxes" collected from the manufacturer on interstate shipments.

Under the New York City "Sales Tax" law (Appendix B), the Comptroller may, and actually does, collect the "Sales Tax" from purchasers where the sales tax has not been paid upon the article. The Comptroller has, in the case at bar, collected the sales tax upon Comptometers from customers of the Respondent. See Document No. 13 (R. 71-72) making claim for such a credit and Document No. 14 (R. 72-73) allowing the claim made.

Furthermore, under the New York City "Personal Property Tax" law (Appendix C), the Comptroller may collect a tax, in the same amount as the sales tax, from persons owning or using in the City of New York articles upon which the "Sales Tax" has not been paid.

The latter law supplements or complements the New York City "Sales Tax" law in the same way that the Cali-

fornia "Use Tax" law supplements the California "Sales Tax" law discussed *infra* under heading VIII.

Under the above New York laws the Comptroller has ample authority to legally collect from the purchasers of Comptometers any taxes due without the loss of any revenue to the city. But the Comptroller, instead of using the laws at his command, insists upon illegally collecting "Sales Taxes" from the Illinois manufacturer and in so doing deliberately imposes a burden on interstate commerce. That he need not and cannot do.

The Local New York Laws are designed to avoid any discrimination when properly administered.

V. No Discrimination Against New York Manufacturers and Merchants Results from Invalidating the Tax Collection in the Case at Bar.

"Comptometers" are computing machines specially manufactured and sold exclusively by the Respondent under its own patents. Local New York manufacturers do not and cannot manufacture these machines. Local merchants cannot and do not sell these machines. All sales are made by the Respondent at and from Chicago, Illinois. To hold that these "Sales Taxes" were erroneously collected does not discriminate against any local New York City merchant or manufacturer or in fact any manufacturer in the United States. The unjust discrimination theory, therefore, does not apply to the facts in the instant case as it might where a general commodity is sold in competition with local trade.

The Comptroller himself can avoid any unjust discrimination by collecting these "Sales Taxes" from Respondent's customers in New York City.

VI. Taxation of the Sales in the Case at Bar is a Burden on Interstate Commerce Under the Decisions of this Court.

Interstate commerce includes the *buying and selling* of commodities for shipment across a state line. *Federal Trade Commission* v. *Pacific States Paper Trade Ass'n*, 273 U. S. 52, 64; *Sonneborn* v. *Cureton*, 262 U. S. 506.

The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce. *Stewart* v. *Michigan*, 232 U. S. 665.

In *Ware & Leland* v. *Mobile County*, 209 U. S. 405, this Court said at page 412:

> "These cases are not in conflict with those in which it is held that the negotiation of sales of goods in a State by a person employed to solicit for them in another State, the goods to be shipped from the one State to the other, is interstate commerce. *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; similar cases are *Rearick* v. *Pennsylvania*, 203 U. S. 507, and *Caldwell* v. *North Carolina*, 187 U. S. 622. In these cases goods in a foreign State are sold upon orders for the purpose of bringing them to the State which undertakes to tax them, and the transactions are held to be interstate commerce, because the subject-matter of the dealing is goods to be shipped in interstate commerce; to be carried between States and delivered from vendor to purchaser by means of interstate carriage."

In *Real Silk Mills* v. *Portland*, 268 U. S. 325, this Court said at page 335:

> "Considering former opinions of this court we cannot doubt that the ordinance materially burdens interstate commerce and conflicts with the Commerce Clause. *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 497; *Brennan* v. *Titusville*, 153 U. S. 289; *Rearick* v. *Pennsylvania*, 203 U. S. 507; *Crenshaw* v. *Arkansas*, 227 U. S. 389; *Texas Transport Co.* v. *New Orleans*, 264 U. S. 150; *Alpha Portland Cement Co.* v. *Commonwealth of Massachusetts*, 268 U. S. 203.

> "The negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce.' * * *"

And recently in *National Labor Relations Board* v. *Fainblatt*, 59 S. Ct. 668, this Court said at page 671:

> "Transportation alone across state lines is interstate commerce."

In *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434, this Court said at page 439:

> "* * * If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because of interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed." [Citing cases.]

Not only the "risk" of double taxation but double taxation in fact can result from the taxation of these sales by the City of New York.

The State of Illinois has a "Retailer's Occupational Tax", enacted June 28, 1933, and still in effect. Smith-Hurd Stats., p. 2767; Cahill's Stats., p. 2389; Ill. State Bar Stats. (1935), p. 2705. This is "An Act in relation to a tax upon persons engaged in the business of selling taxable personal property to purchasers for use or consumption." The tax is based upon gross sales. If Illinois can tax the sales in question and New York City can also tax them, there is double taxation in fact. Furthermore, there is no prohibition upon the State of Illinois or the City of Chicago from enacting a "Sales Tax" on these very sales. Again, the Respondent can be subjected to a personal property tax

on the machines which it has on hand in Chicago for delivery to customers outside of the State.

If New York City can tax the company for sales to New York customers then every city in the United States and every State may tax such sales when made to its inhabitants. That situation would immediately raise tariff walls around each city and state of the Union which would be destructive not only of interstate commerce but of the very protection which the Commerce Clause was designed to preserve.

Other burdens on interstate commerce in the case at bar consist of the compulsion, under the sales tax law, of the Comptroller of New York City forcing an Illinois corporation to act as a collecting agency for the city; the compulsion of forcing an Illinois corporation to file returns and reports with the City of New York; and the collection by the City of New York from an Illinois company of "Sales Taxes" which it can legally collect from the local New York purchasers in New York City.

The City of New York sent auditors to the City of Chicago to examine the Respondent's books and records. (R. 62-63) If the City of New York can do this, then every city in the United States which has a sales tax can send its auditors to the company's offices with the result that Respondent's offices would be overrun by investigators, auditors, checkers and others, to the utter disruption of its business.

When the City of New York compels an Illinois corporation, which is not authorized to do business in New York, to act as a collecting agency for the City, compels it to file returns, to make reports, etc., the City is attempting to exercise its sovereign powers beyond its jurisdiction. That it cannot do without burdening interstate commerce.

VII. A "Sales Tax" and a "Use Tax" Differ Fundamentally.

A "Sales Tax" applies only to a local sale. A "Use Tax", as the name implies, is a tax upon the privilege of owning, using, consuming or enjoying the possession of property and applies to goods, in the hands of the purchaser, owner

or user, whether or not they have been imported from a foreign state or country. In the instant case the "Use Tax" applies to the *customers* of the Respondent and *not* to the Respondent who is the manufacturer. In the case at bar the city is taxing the Illinois manufacturer for "Sales Taxes" and not the New York purchaser for "Use Taxes".

The case at bar does *not* involve a New York City *purchaser-consumer* but it *does* involved an Illinois *manufacturer-seller*. The distinction is obvious.

"Sales Tax" cases and "Use Tax" cases are further discussed *infra* under headings VIII and IX.

VIII. The Decisions of the Court Below Do Not Conflict With the "Use" or "Privilege" Tax Decisions of this Court.

The decisions of this Court which petitioner urges as conflicting with the decisions below are readily distinguishable. They involved "license" or "privilege" taxes for doing a "local" business or "use" taxes for the "local" employment or enjoyment of personal property. These taxes were sustained because of the "local", intrastate nature of the activity engaged in or because the articles were in "local" use. The taxable event was the local use or possession as distinguished from a tax on the sales of goods in interstate commerce.

(a) The "Use" tax cases.

The recent cases of *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 305 U. S. ...., 59 Sup. Ct. 376; *Southern Pacific Co.* v. *Gallagher*, 305 U. S. ...., 59 Sup. Ct. 389; and *Pacific T. & T. Co.* v. *Gallagher*, 305 U. S. ...., 59 Sup. Ct. 396, all involved the California "Use Tax"—*not* the California "Sales Tax". This Court held that the "local" use and enjoyment of articles imported from another State was taxable and did not burden interstate commerce.

Those decisions would be applicable where a customer of the Respondent sued to recover the New York City

"Sales Tax" paid by him on a "comptometer" upon which the sales tax had not been paid or to recover the New York City "Personal Property Tax" paid for possession and use of an article upon which the sales tax had not been paid. Otherwise the cases bear no analogy.

Henneford v. *Silas Mason Co.*, 300 U. S. 577, involved a "use" or "excise" tax on the privilege of using articles imported in interstate commerce which had become part of the common mass of property at rest in the State. It was a tax upon the "local" privilege of "local" use.

(b) The "Privilege", "Excise" and "Use" tax cases.

Coverdale v. *Pipe Line Co.*, 303 U. S. 604, involved a "privilege" tax on the "local" operation of machines for producing mechanical power. The tax was measured by the horsepower capacity of the machine used. The tax was laid on a "local" business and a purely local "use".

Nashville C. & St. L. Ry. Co. v. *Wallace*, 288 U. S. 249, involved a "privilege" or "excise" tax on the withdrawal for use of gasoline "locally" stored. The same was true in *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472, and *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86, the latter tax being characterized as a "license fee", an "excise", upon the "local use" of motor fuel in the State.

And *Edelman* v. *Boeing Air Transp.*, 289 U. S. 249, involved a "license" or "use" tax on the withdrawal of gasoline "locally" stored within the State.

Bacon & Sons v. *Martin*, 305 U. S. 380, involved an "excise" tax based upon the "use" of cosmetics locally within the State after importation.

Ware & Leland v. *Mobile County*, 209 U. S. 405, involved a "license tax" on persons engaged in buying and selling cotton futures and this Court held that the business was "local" and subject to tax. (But see the distinction made on page 412 as to orders taken for the sale of goods to be shipped from another State.) The same principles

controlled in *Moore* v. *N. Y. Cotton Exchange*, 270 U. S. 593, because of the "local" business done and the "local" nature of the "transactions".

Postal Tel.-Cable Co. v. *Richmond*, 249 U. S. 252, involved a "license tax" on the "local" business done within the City for the "privilege of doing business" therein.

The overzealous attempt of the petitioner to bring this case within the principles of the "storage" and "use" cases above must fail; *First*, because the statements on pages 5 and 10 of the petition for certiorari that the Respondent has "extensive storage facilities in New York City" is not a fact supported by the record, and, *Second*, because this is not a storage, withdrawal, or use tax case but a "Sales Tax" case in which the taxing power of the City is limited to a "local" sale.

The record shows that the Respondent did not have extensive storage facilities in New York City used for the storage of machines for sale (R. 28, 32, 38, 40, 45, 46) and the only machines stored were used for repair loans and rentals (R. 37, 40, 47, 48). The machines used for repair loans and rentals are *not* the subject of the sales taxes in issue in the case at bar.

IX. The Decisions of the Courts Below Do Not Conflict With the Sales Tax Decisions of this Court.

Banker Brothers Company v. *Pennsylvania*, 222 U. S. 210, involved the local sale of an automobile by a local dealer. The contract of sale was executed locally, the purchase price was received locally and delivery was local. This Court distinguished the case of "a sale by the manufacturer at the factory" holding that "the contract was made in Pennsylvania, and was there to be performed by the delivery of the automobile and the payment of the balance of the purchase price." All of the incidents of the transaction were local and constituted a local sale in Pennsylvania.

Wiloil Corporation v. *Pennsylvania*, 294 U. S. 169, involved a tax of 3 cents a gallon levied "upon all liquid fuels used or sold and delivered by distributors within the commonwealth." In that case the company, with its principal place of business in Pittsburgh, sold liquid fuels at wholesale and was a "distributor" as defined by the Act. The Philadelphia agent of the company ordered 13 tank cars for delivery to purchasers in Philadelphia and Essington, Pennsylvania. The order specified a price per gallon "f. o. b. Wilmington, Del., plus 3 cents tax" and was received at the company's office in Pittsburgh for approval. The company obtained the fuel at Wilmington and *on the order of the company* it was shipped by rail from there to the purchasers in Pennsylvania. This Court said that the commerce clause does not prevent taxation of goods by the State in which they are found merely because brought from another State and held that an "interstate transportation was not required or contemplated." The sales contracts were made in Pennsylvania, the company was doing business in Pennsylvania and deliveries were made in Pennsylvania. Under such circumstances the whole transaction and all of its incidents were local and subject to tax.

X. The Decision of the Courts Below Do Not Conflict With the "Gross Receipts" Tax or "Personal Property" Tax Decisions of this Court.

Western Live Stock v. *Bureau*, 303 U. S. 250, involved a "privilege tax" measured by gross receipts from "business done" (advertising) locally within the State. This Court held that the tax was "an excise conditioned on the carrying on of a local business." (p. 257.) This Court emphasized the fact that the tax did "not embrace the purchase price of the articles shipped in interstate commerce" (pp. 258-259). Receipts from subscriptions to the magazine from without the State and the circulation of the magazine interstate were *not* included in the measure of the tax.

Adams Mfg. Co. v. Storen, 304 U. S. 307, involved the Indiana Gross Income Tax based upon "gross receipts derived from trades, businesses, or commerce." This Court held it was a "privilege tax" upon the receipt of gross income and since under the statute interstate commerce would be subjected to the "risk of a double tax burden" the tax was held to be a burden upon such commerce.

Minnesota v. *Blasius*, 290 U. S. 1, involved a personal property tax. Cattle shipped from another State were at rest in the St. Paul stockyards when purchased by the defendant. They were there being held at the pleasure of their owner, for disposal or use. This Court held that they had acquired a local "situs", and, being locally owned as part of the general mass of property within the State, the defendant was subject to the personal property tax on such ownership although he later sold and shipped them to another State.

XI. There is No Conflict in the State Court Decisions.

Petitioner suggests a conflict between the decision of the Supreme Court of Appeals of West Virginia in the case of *Lewis* v. *City of Bluefield*, 117 W. Va. 782, 188 S. E. 237, and the decision in the case at bar. There is no conflict in fact or law.

That West Virginia case involved an annual "license" tax for the local privilege of "doing business" (selling and delivering coal) based on the tonnage capacity of vehicles "locally" employed in that business. The Court expressly held that the tax was *not* "an excise upon the privilege of importation nor a tax upon that which is imported". (Page 789.)

Compare: *Kresge Co.* v. *City of Bluefield*, 117 W. Va. 17; and *Anderson-Newcomb* v. *Huntington*, 117 W. Va. 716, where a consumers "sales tax" was held invalid.

CONCLUSION.

No conflict of decisions exists. The decisions below are correct and in accord with the decisions of this Court. The petition should be denied.

Respectfully submitted,

NEWTON K. FOX,
Attorney for Respondent.

May, 1939.

APPENDIX A.

Laws of New York Provisions of State Enabling Act.

Chapter 873.

Section 1. Notwithstanding any other provision of law to the contrary, any city of the State having a population of one million inhabitants or more acting through its local legislative body, is hereby authorized and empowered until December thirty-first, nineteen hundred thirty-five to adopt and amend local laws imposing in any such city any tax and/or taxes which the legislature has or would have power and authority to impose to relieve the people of any such city from the hardships and suffering caused by unemployment and make provision for the collection thereof by the chief fiscal officer of any such city. The tax or taxes imposed pursuant to such local laws shall be effective only during the period commencing when this act becomes effective and ending December thirty-first, nineteen hundred thirty-five, or any portion of such period. *A tax imposed hereunder shall have application only within the territorial limits of any such city and shall be in addition to any and all other taxes.* [Italics ours.]

* * *

This act shall not authorize the imposition of a tax on any transaction originating and/or consummated outside of the territorial limits of any such city, notwithstanding that some act be necessarily performed with respect to such transaction within such limits. [Italics ours.]

This act shall not authorize the imposition of a tax on a non-resident of such city or on account of any transaction by or with a non-resident of such city, except when imposed without discrimination as between residents and non-residents, on account of tangible property actually located or income earned, or trades, businesses or professions carried

on within such city, or on account of transfers, retail sales or other transactions actually made or consummated within such city by a non-resident while within such city. A corporation shall not be deemed a non-resident by reason of the fact its principal place of business is not within the city.

APPENDIX B.

Local Laws of the City of New York.

Sales Tax.

For the Year 1934, No. 20 as amended by No. 24.

* * *

§1. Definitions. When used in this local law:

(a) The word "person" includes an individual, copartnership, society, association, joint stock company, corporation, estate, receiver, trustee or any other person acting in a fiduciary capacity, and any combination of individuals;

(b) The word "vendor" means a person selling property or rendering services upon the receipts from which a tax is imposed under section 2 of this local law;

(c) The word "purchaser" means a person who purchases property or to whom are rendered services, receipts from which are taxable under section 2 of this local law;

* * *

(e) The word "sale" or "selling" means any transfer of title or possession or both, exchange or barter, license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, and may include the rendering of any service specified in section 2 of this local law;

* * *

(g) A "retail sale" or "sale at retail" means a sale to a customer, or to any person for any purpose other than for resale in the form of tangible personal property;

* * *

§ 2. Imposition of tax. During the period commencing on December tenth, nineteen hundred and thirty-four, and ending on December thirty-first, nineteen hundred and thirty-five, there shall be paid a tax of two per centum upon

the amount of the receipts from every sale in the city of New York of:

(a) Tangible personal property sold at retail, except those articles described in schedule "A" below;

• • •

Receipts from sales or services by or to the state or city of New York, and receipts from sales or services by or to semi-public institutions, and *receipts upon which the state of New York and city of New York are by virtue of the provisions of the constitution of the United States or otherwise without power to impose a tax shall not be subject to tax hereunder.* [Italics ours]

• • •

Where a purchaser has failed to pay and a vender has failed to collect a tax upon a sale or service, as imposed by this local law, *then* in addition to all other rights, obligations and remedies provided, *such tax shall be payable by the purchaser directly to the comptroller* and it shall be the duty of the purchaser to file a return thereof with the comptroller and to pay the tax imposed thereon to the comptroller within fifteen days after such sale was made or service rendered. [Italics ours]

The *comptroller* may, wherever he deems it necessary for the proper enforcement of this local law, *provide* by regulation *that the purchaser shall file returns and pay directly to the comptroller the tax herein imposed,* at such times as returns are required to be filed and payment over made by vendors. [Italics ours]

APPENDIX C.

New York City Personal Property Tax.

Sec. 1. Imposition of Tax. During the period commencing on January 1, 1935 and ending on December 31, 1935, there shall be paid by the owner a tax of 2 per centum upon the value of the following-named *articles of personal property situated or owned within the City of New York.*

• • • •

e. Machinery of every type and variety, including *typewriters and all other business machinery* • • •;

Sec. 2. Exemptions. No tax, as imposed by Section 1 of this title shall be due or payable in any event upon any of the articles enumerated in the said section 1, and no return need be made thereon pursuant to the provisions of this law if any of the following conditions be demonstrated to the satisfaction of the Comptroller.

• • • •

c. That the said article is one *upon the receipt from the sale of which a tax has been paid* pursuant to the provisions of this law or Local Law 20, of 1934, as amended. [The City "Sales Tax"] (Italics ours).

• • • •

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 45.

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, *Petitioner,*

v.

FELT & TARRANT MFG. CO.

On Writ of Certiorari to the Supreme Court of the State of New York.

BRIEF FOR THE RESPONDENT.

NEWTON K. FOX,
Attorney for Respondent.

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BRIEF FOR THE RESPONDENT.

OPINIONS BELOW.

The memorandum opinion of the Court of Appeals is reported in 279 N. Y. 678, 18 N. E. (2d) 311, and the opinion of the Appellate Division is reported in 254 App. Div. 246, 4 N. Y. S. (2d) 615.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code, as amended by the Act of February 13, 1925. Petition for a writ of certiorari was granted June 5. 1939.

QUESTION PRESENTED.

Are sales of goods manufactured in Chicago, Illinois, by an Illinois corporation, which is not authorized to do business in the State of New York, subject to the New York City "Sales Tax" where acceptance of the order for the goods must be and is approved in Chicago, the goods are appropriated to the order in Chicago, and are then shipped in interstate commerce to the customer in New York City?

STATUTES INVOLVED.

Laws of the State of New York, Chapter 873 of the Laws of 1934, as amended. (Cahill's Consolidated Laws of New York 1931-1935 Supplement, page 798).

New York City "Sales Tax", Local Law No. 20 (published as No. 21, p. 143) as amended by Local Law No. 24 (published as No. 25, p. 164) of the Laws of 1934 of the city of New York.

New York City "Personal Property Tax", Local Law No. 25 of 1934, No. 31 of 1935, No. 28 of 1936, No. 21 of 1937, No. 28 of 1938 of the city of New York.

Pertinent excerpts are found in the "Appendix" hereto, A, B, and C.

STATEMENT.

This case involves a New York City "Sales Tax" illegally collected from an Illinois manufacturer, not qualified to do business in the State of New York, on sales in interstate commerce.

The facts are set out in the opinion of the Appellate Division. (R. 78-80)

The taxpayer, Felt & Tarrant Mfg. Co. is a corporation organized under the laws of the State of Illinois. Its factory and principal office and place of business is located in Chicago, Illinois. It is engaged in the business of manufacturing and selling adding and calculating machines known as "Comptometers". (R. 3, 25, 32, 78-79)

Felt & Tarrant Mfg. Co. has not qualified to do business in the State of New York. (R. 3-4, 31, 60, 78-79)

All manufacturing is done at Chicago, Illinois (R. 32, 79) The Company has *no* manufacturing plant in the State of New York (R. 25, 79); *no* warehouse or other depository in the State of New York (R. 28, 79) and *no* stock of machines on hand in New York City from which sales are made. (R. 28, 32, 38, 40, 45, 46, 79)*

The Company reserves the sole and exclusive right to sell comptometers. (R. 51)

The Company maintains an office in New York City for the purpose of soliciting orders for comptometers. (R. 32, 79).** It employs a principal and sub-solicitors to solicit orders for comptometers from customers in the City of New York. (R. 33, 79) They have the sole and exclusive right to solicit orders. (R. 51)

Solicitors operate under a written agreement with the Company. (Exhibit 2, R. 54-58, 79) Under the terms of the agreement the duties of solicitors are restricted *solely* to the solicitation of orders. (Exhibit 2, par. 1, R. 56-57, 79) Solicitors have no power to accept an order (R. 39) or to collect money for an order. (Exhibit 2, par. 5, R. 57)

The Company uses a standard form of order blank (R. 26-27, 79, Exhibit 1, R. 53). All orders must be addressed to "Felt & Tarrant Mfg. Co., Chicago, Illinois" (R. 37, 79, Exhibit 1, R. 53) and on the face of the order blank is printed: "All orders subject to the acceptance of an officer of the Company in Chicago". (R. 53, 79)*** All orders received must be approved by an officer of the Company, at Chicago, Illinois, and an order cannot be filled without

*The graphic description of "workrooms," "stockrooms" and "storage facilities" found on pages 3-4 of the City's Brief are not warranted by the findings below (R. 78-80) or by the evidence.

**The statement on page 3 of the City's Brief that "There it sells, * * * comptometers" is not warranted by the findings below (R. 78-80) or by the evidence.

***Statements to the contrary on page 4 of the City's Brief are misleading.

such approval. (R. 27-28, 39, 40, Exhibit 2, par. 1, R. 56-57)*

After approval the order goes to the Billing Department, at Chicago, where an order is made out on the Shipping Department at Chicago, Illinois, for the shipment of a comptometer. (R. 27, 29, 30, 79, Exhibit A, R. 58) A comptometer is then allocated, by Serial Number, to the order by the Shipping Department, at Chicago, and the individual Serial Number of the Comptometer, so appropriated to the order, is inserted in the upper right-hand corner of the shipping order. (R. 27, 30, 79, Exhibit A, R. 58) The complete, assembled, machine is then packed in an *individual carton* for shipment to the purchaser. (R. 39, 79) The shipping order, at Chicago, is then turned over to the Billing Department, at Chicago, where an "Invoice" is made out at Chicago, for the specific "comptometer" by Serial Number of the machine appropriated to the individual customer's order. (R. 30, 79, Exhibit B, R. 59)

The invoice is mailed from Chicago to the customer showing the Serial Number of the specific Comptometer shipped. (R. 30, 79, Exhibit B. R. 59) The Invoice states on its face: "Make All Checks Payable to Company—Remit Directly to Chicago". (R. 59, 79)

All remittances are sent direct to Chicago and all collections are made at Chicago, Illinois. (R. 30, 79) *No* billings are sent from and *no* collections are made in New York City. (R. 30, 79)

The Comptometers are shipped in interstate commerce by common carrier, express, freight or motor service to the customer (R. 28, 41) packed in individual separate cartons. (R. 39, 79)

Prices for machines and trade-in values are fixed by the Company at Chicago (Exhibit 2, pars. 4 and 7, R. 57) and prices quoted by solicitors are subject to checking at Chicago. (R. 38)*

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*Statements to the contrary on pages 4-5 of the City's Brief are misleading.

No Comptometers at the New York office are available for sale. (R. 28, 32, 38, 40, 45, 46, 79) The Comptometers at the New York office are used only for repair loans, trials and demonstrations. (R. 37, 40, 47, 48, 79-80) These machines are *never* sold to customers in New York City. (R. 32, 37-38, 45, 46, 47)

Comptometer Company, a Delaware Corporation, and a subsidiary of taxpayer, is authorized to do business in the State of New York. (R. 60, 80)

Servicing of the comptometers under the one year guarantee and repairs to machines after the guarantee period had expired, were until August 31, 1935, performed by Felt & Tarrant Company, and after that time they were performed by Comptometer Company. (R. 33-34, 14 C, Doc. 3)

Sales tax returns have been filed and New York City "Sales Taxes" have been paid on all charges for repair work and services to Comptometers performed in New York City and for all local sales of parts and local rental of machines during the taxable period in suit. (R. 40-41, 51)

The Comptroller of the City of New York assessed additional "Sales Taxes" and interest of $3,122.53 against Felt & Tarrant Company on alleged taxable sales (R. 72-73); the assessment was involuntarily paid under protest and duress (R. 8-9); application was filed for a refund of the taxes and interest paid (R. 10-11); and refund was denied. (R. 74-75)

An order of certiorari was granted by the Supreme Court, New York County, to review the determination of the Comptroller. (R. 2-3)

The Appellate Division, First Judicial Department, sustained the order of certiorari and annulled the determination of the Comptroller in the sum of $2,9737.98, the taxpayer having admitted that an additional tax of $148.55 was due for rental of machines to the Comptometer Company and on sales of parts. (R. 76-80)

The Court of Appeals affirmed the Appellate Division (R. 90) on the authority of its prior decision in *Matter of National Cash Register Co. v. Taylor*, 276 N. Y. 208.

A petition for a writ of certiorari was granted June 5, 1939.

SUMMARY OF THE ARGUMENT.

The power of the City of New York to levy a sales tax is necessarily restricted to purely "local" sales. The sales here taxed were not local but exterritorial being consummated in Chicago, Illinois, where the specific machine, by serial number, was appropriated to the order of the customer and was shipped in interstate commerce.

The Enabling Act and the City "Sales Tax" Act expressly exempt taxation of sales in interstate commerce. The New York Courts have held that these particular sales were made in interstate commerce and were therefore exempt from local taxation.

The protection of the commerce clause extends to all contracts, negotiations and sales of goods shipped in interstate commerce which includes buying and selling of commodities for shipment across a state line. A burden on interstate commerce exists where any of these negotiations, sales or intercourse is impeded by State legislation.

By erroneous administration the New York City "sales tax" becomes a burden on interstate commerce by levying the tax upon an Illinois manufacturer for sales in interstate commerce. Not only the "risk" of double taxation but multiple taxation in fact will result. The power exerted by the City of New York to compel an Illinois manufacturer to file returns and reports, to submit its books for inspection, to keep accounts, to pay the tax or act as a collection agency for the City, is beyond its jurisdiction and places a direct burden on interstate commerce.

There is no discrimination against New York City manufacturers and merchants because they do not and cannot sell "comptometers." The City can avoid any discrimination

by collecting a personal property tax from New York City purchasers.

The "Use Tax," "Sales Tax," "Gross Receipts Tax," "License," "Privilege" and "Excise" tax decisions of this Court are distinguishable by reason of the nature of the taxes there levied as well as by the differences in the facts.

ARGUMENT.

I. The Power of New York City to Levy a "Sales Tax" is Necessarially Restricted to Purely Local Sales.

New York City has enacted a "sales tax" and as supplementary thereto a "personal property tax".

The "sales tax" is necessarily restricted by the Enabling Act (Appendix A) and the Sales Tax Act itself (Appendix B) to purely local sales and excludes sales involving transportation in interstate commerce.

The "personal property tax", (Appendix C) levied at the same rate as the sales tax, applies to the local ownership, possession or use of property whether or not the goods were transported in interstate commerce.

Thus if a resident of New York City orders a piano from a Boston manufacturer a sales tax cannot be legally collected but a personal property tax may.

The instant case is before this Court simply because the City taxing authorities choose to illegally collect a sales tax from a foreign manufacturer, not qualified to do business in the State of New York, upon a foreign sale, made in the State of Illinois, with the resulting transportation of the goods in interstate commerce instead of legally collecting a personal property tax from the local New York City purchaser.

Under the above Local Laws the Comptroller has ample authority to legally collect from the purchasers of Comptometers any taxes due without the loss of any revenue to the city. But the Comptroller, instead of using the laws at his command, insists upon illegally collecting sales taxes

from the Illinois manufacturer and in so doing deliberately imposes a burden on interstate commerce. That he need not and cannot do.

The Local Laws are designed to avoid any discrimination as between local and foreign merchants when properly administered.

The plea of loss of revenue raised by the City in its brief is wholly unfounded as applied to the facts of this particular case. The City has found it easily possible to collect a tax from the New York purchasers of Comptometers. (Document No. 13, R. 71-72; Document No. 14, R. 72-73)

II. The Sales Were Not Local and Are Therefore Not Taxable Under the New York City Sales Tax Law.

Under the New York City Local Laws, sales are taxable only if the goods are *sold locally*. Where specific goods are appropriated to an order outside of the City and State of New York and are shipped in interstate commerce, the transaction is *not* a local sale subject to tax. That is the fundamental principle underlying the decided cases.

Where an order for goods is taken in New York City, which order is addressed to and must be approved by the manufacturer seller outside of the City and State of New York the contract of sale is incomplete until acceptance and approval of the order. The place where the order is approved and where specific goods are appropriated to the order establishes the *situs* of the sale and the acceptance of the order completes the contract of sale. In the case at bar, the *situs* was outside of the City of New York.

The Enabling Act, Chapter 873 of the Laws of New York of 1934 restricted the power of the City to the taxation of purely "local" sales.

Section 1 provides:

> "A tax imposed hereunder shall have application only within the territorial limits of any such city * * * ".

It further provides:

> "This act shall not authorize the imposition of a tax on any transaction originating and/or consummated outside of the territorial limits of any such city, *notwithstanding that some act be necessarily performed with respect to such transaction within such limits*". (Italics ours.)

The City "Sales Tax" Law expressly exempts sales in interstate commerce.

Section 2 provides:

> " * * * receipts upon which the state of New York and city of New York are by virtue of the provisions of the constitution of the United States or otherwise without power to impose a tax shall not be subject to tax hereunder".

New York City may not, under these laws, tax exterritorial sales effected outside of the territorial limits of the city. The courts below held the sales in the case at bar were not subject to the tax.

In the case at bar the sales were consummated in Chicago, Illinois, the specific goods were appropriated to the sales in Chicago, and the goods were then shipped in interstate commerce. The City cannot exert its taxing powers exterritorially or tax sales in interstate commerce.

As the Court of Appeals said in the case of *Matter of National Cash Register Co.* v. *Taylor*, 276 N. Y. 208, certiorari denied, *sub. nom McGoldrick, Comptroller* v. *National Cash Register Co.*, 303 U. S. 656, at pp. 213-214:

> " * * * The rule formulated and applied in these cases brings within the taxing power of the State the products of the petitioner held in stock in New York for sale. A tax imposed by the State on the sale of goods produced here and goods imported from other States is valid. However, the goods delivered under a 'special order' were not within the State when the order was given. The contract of sale did not become effective until the order given in New York was accepted

in Ohio; the goods sold were manufactured in Ohio; they were appropriated to the contract of manufacture or sale in Ohio; they were never held here at the pleasure of the seller for disposal or use; they were sent to the office here of the seller only for delivery to the buyer and as a convenient step in the transportation from the factory of the seller outside the State to the buyer here."

"* * * Here, on the contrary, the contract made outside the State called for the delivery of goods which were manufactured outside of the State and which could not be procured within the State."

III. Taxation of These Sales is Prohibited by Article I, Section 8, Clause 3, of the Constitution of the United States.

The City "Sales Tax" Law expressly exempts sales in interstate commerce.

The sales herein involve interstate commerce. Under the decided cases the taxing thereof was a burden on interstate commerce and beyond the power of the City of New York.

In *Matter of National Cash Register Co.* v. *Taylor*, 276 N. Y. 208, 252 App. Div. 90, certiorari denied, 303 U. S. 656, the Court of Appeals said at pages 212 and 213:

"The power of the state of New York to tax receipts derived from transactions in interstate commerce is limited by the provisions of the Constitution of the United States. The power of the city of New York to tax receipts from sales is conferred upon it by statute (Laws of 1934, ch. 873). The power so conferred cannot transcend the limitations imposed upon the power of the state by the Constitution of the United States, and it is restricted further by limitations imposed by the State in the Enabling Act. That act provides expressly that it does not 'authorize the imposition of a tax on any transaction originating and/or consummated outside of the territorial limits of any such city, notwithstanding that some act be necessarily performed with respect to such transaction within such limits.'"

In that case the Court also said:

"• • • However, the goods delivered under a 'special order' were not within the State when the order was given. The contract of sale did not become effective until the order given in New York was accepted in Ohio; the goods sold were manufactured in Ohio; they were appropriated to the contract of manufacture or sale in Ohio; they were never held here at the pleasure of the seller for disposal or use; they were sent to the office here of the seller only for delivery to the buyer and as a convenient step in the transportation from the factory of the seller outside the state to the buyer here." • • •

In *Matter of West Publishing Co.* v. *Taylor*, 276 N. Y. 535, certiorari denied, *sub nom McGoldrick, Comptroller* v. *West Publishing Co.*, 303 U. S. 656, the Court of Appeals held the City Sales Tax was *not* applicable on the following facts, saying at page 536:

"• • • Written orders for certain of its publications, directed to petitioner at St. Paul, Minnesota, and subject to its approval, were obtained by its local salesman in New York City during the period from December 10, 1934, to August 31, 1935. In each case such order was sent by its New York office to St. Paul, with any cash deposit that might have been made by the purchaser, for the purpose of approval. Upon the receipt of such orders at St. Paul, the petitioner ascertained the credit responsibility of the purchaser. If the petitioner was satisfied with the purchaser's credit responsibility, the order was filled by petitioner by making shipment of the publication so ordered at and from St. Paul to the purchaser at the address given in the written order."

The principles announced in the above cases are amply supported by the decisions of this Court, *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; *Stewart* v. *Michigan*, 232 U. S. 665; *Dozier* v. *Alabama*, 218 U. S. 124; *Brennan* v. *Titusville*, 153 U. S. 289; *Rearick* v. *Pennsylvania*, 203 U. S. 507; *Crenshaw* v. *Arkansas*, 227 U. S. 389; *Caldwell* v.

North Carolina, 187 U. S. 622; *Cheney Bros.* v. *Massachusetts*, 246 U. S. 147; *Alpha Cement Co.* v. *Massachusetts*, 268 U. S. 203.

A sales tax imposed upon and collected from a manufacturer of goods shipped in interstate commerce is a burden upon that commerce and therefore violates the commerce clause of the Constitution.

IV. The Protection of the Commerce Clause Extends to All Contracts, Negotiations and Sales of Goods Shipped in Interstate Commerce.

Interstate commerce includes the *buying and selling* of commodities for shipment across a state line. *Federal Trade Commission* v. *Pacific States Paper Trade Ass'n*, 273 U. S. 52, 64; *Sonneborn* v. *Cureton*, 262 U. S. 506.

The negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce. *Real Silk Mills* v. *Portland*, 268 U. S. 325, 333; *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; *Stewart* v. *Michigan*, 232 U. S. 665. Where goods are purchased in one State for transportation to another, the "Commerce" includes the purchase quite as much as it does the transportation. *Currin* v. *Wallace*, 306 U. S. 1, 10.

Where commodities are bought for use beyond State lines, the sale is a part of interstate commerce and both the buying and the selling are interstate commerce and are not subject to State regulation. *United States* v. *Rock Royal Co-Op*, 307 U. S. 533, 569; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 290, 291; *Lemke* v. *Farmer's Grain Co.*, 258 U. S. 50, 54-55; *Shafer* v. *Farmer's Grain Co.*, 268 U. S. 189, 198-199; *Federal Trade Commission* v. *Pacific States Paper Trade Assn.*, 273 U. S. 52, 64; *Kidd* v. *Pearson*, 128 U. S. 1, 20; *Sonneborn* v. *Cureton*, 262 U. S. 506.

In *Ware & Leland* v. *Mobile County*, 209 U. S. 405, this Court said at page 412:

"These cases are not in conflict with those in which it is held that the negotiation of sales of goods in a State by a person employed to solicit for them in another State, the goods to be shipped from the one State to the other, is interstate commerce. *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; similar cases are *Rearick* v. *Pennsylvania*, 203 U. S. 507, and *Caldwell* v. *North Carolina*, 187 U. S. 622. In these cases goods in a foreign State are sold upon orders for the purpose of bringing them to the State which undertakes to tax them, and the transactions are held to be interstate commerce, because the subject-matter of the dealing is goods to be shipped in interstate commerce; to be carried between States and delivered from vendor to purchaser by means of interstate carriage."

As this Court said in *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, at page 615:

"* * * Highland in Washington may sell to High in Virginia, and High may buy from Highland, at any price they please. Not till the milk is resold in Virginia within a market area will the price minimum apply, and then only to the price to be charged on the resale. Cf. *Wiloil Corp.* v. *Pennsylvania*, 294 U. S. 169, 175; *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506; *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511. If there could be any doubt about this as a matter of construction, the doubt would be dispelled by the administrative practice and by the warning of the statute, expressed in §14, that operations in interstate commerce shall not be deemed to be affected. * * *"

A like provision as to interstate commerce is contained in the New York City "Sales Tax" Act.

A State cannot lay a tax on interstate commerce in any form. *Cooney* v. *Mountain States T. & T. Co.*, 294 U. S. 384, 392; *Helson* v. *Kentucky*, 279 U. S. 245, 249.

In *Real Silk Mills* v. *Portland*, 268 U. S. 325, solicitors took orders for goods manufactured in another State and collected in advance a payment which was their commission. The orders were sent to the home office for filling and

the goods shipped direct to the customers. In holding that a municipal ordinance requiring a license fee from the solicitors was a burden on interstate commerce and therefore invalid, the Court said at page 335:

> "Considering former opinions of this court we cannot doubt that the ordinance materially burdens interstate commerce and conflicts with the Commerce Clause. *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 497; *Brennan* v. *Titusville*, 153 U. S. 289; *Rearick* v. *Pennsylvania*, 203 U. S. 507; *Crenshaw* v. *Arkansas*, 227 U. S. 389; *Texas Transport Co.* v. *New Orleans*, 264 U. S. 150; *Alpha Portland Cement Co.* v. *Commonwealth of Massachusetts*, 268 U. S. 203.
>
> 'The negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce.' * * * "

The facts in *Alpha Cement Co.* v. *Massachusetts*, 268 U. S. 203, where orders were solicited are strikingly similar to those in the case at bar. The excise tax there was held invalid under the commerce clause.

Recently in *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, this Court said at pages 605-606:

> "Here interstate commerce was involved in the transportation of the materials to be processed across state lines to the factory of respondents and in the transportation of the finished product to points outside the state for distribution to purchasers and ultimate consumers. Whether shipments were made directly to respondents, as the Board found, or to a representative of Lee Sportswear Company at the factory, as respondents contend, is immaterial. It was not any the less interstate commerce because the transportation did not begin or end with the transfer of title of the merchandise transported. * * * Transportation alone across state lines is commerce within the constitutional control of the national government and subject to the regulatory power of Congress. *Gibbons* v. *Ogden*, 9 Wheat. 1; *Champion* v. *Ames*, 188 U. S. 321."

And in *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434, it was said at page 437:

> "We need not stop to consider which, if any, of appellant's activities in carrying on its business are in themselves transportation of the fruit in interstate or foreign commerce. For the entire service for which the compensation is paid is in aid of the shipment and sale of merchandise in that commerce. Such services are within the protection of the commerce clause, *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; *Caldwell* v. *North Carolina*, 187 U. S. 622; *Real Silk Mills* v. *Portland*, 268 U. S. 325; * * * ."

Again in *Foster Packing Co.* v. *Haydel*, 278 U. S. 1, it was said at page 10:

> " * * * In determining what is interstate commerce, courts look to practical considerations and the established course of business. *Swift and Co.* v. *United States*, 196 U. S. 375, 398; *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, 59; *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 309; *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189, 198, 200. Interstate commerce includes more than transportation; it embraces all the component parts of commercial intercourse among States. And a state statute that operates directly to burden any of its essential elements is invalid. *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282, 290; *Shafer* v. *Farmers Grain Co., supra*, 199. * * * "

Thus interstate commerce embraces and the commerce clause protects not only shipments and transportation but all negotiations and contracts of sale as well. It extends to all the component parts of that intercourse.

A burden on interstate commerce exists where any of these negotiations, sales or intercourse is impeded by State legislation.

V. The New York City Sales Tax, by Erroneous Administration, Becomes a Burden on Interstate Commerce.

The New York City Sales Tax Act, as such, is not unconstitutional. However, by erroneous administration, in applying its provisions to other than local sales and in particular to sales in interstate commerce, a burden is placed on such commerce in violation of the Commerce Clause.

It must be borne in mind that the tax in the case at bar was imposed upon and collected from a foreign manufacturer and not from a local purchaser in New York City.

That results in a direct burden on interstate commerce because the amount of tax payable by the manufacturer to the City depends entirely upon the amount of interstate business done, namely, 2 per cent on all gross sales made in New York City. It is therefore a direct charge on interstate business and a burden on such commerce.

As this Court recently said in *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, at pages 311-312:

> "The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by States in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids. We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by Article I, § 8 of the Constitution * * *."

Also, in *Gwin, White & Prince, Inc.*, v. *Henneford*, 305 U. S. 434, a state tax measured by gross receipts from sales in interstate commerce was held prohibited by the Commerce Clause.

And in *Anglo-Chilean Corp* v. *Alabama*, 288 U. S. 218, the Court held that a tax for the privilege of doing busi-

ness was invalid as repugnant to the Commerce Clause because it was measured by the value of goods imported and thereafter sold in interstate commerce.

To permit the City of New York to levy and collect this sales tax from an Illinois manufacturer, as was done in the case at bar, burdens interstate commerce. The Courts below so held on the facts of this case.

There is also the "risk" of multiple taxation in the case at bar. Such a risk discriminates against interstate commerce and makes the tax repugnant to the Commerce Clause. This principle is recognized in *Gwin, White & Prince, Inc., v. Hanneford*, 305 U. S. 434, where the Court said at pages 439-440:

> "Here the tax, measured by the entire volume of the interstate commerce in which appellant participates, is not apportioned to its activities within the state. If Washington is free to exact such a tax, other states to which the commerce extends may, with equal rights, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed. (Citing cases.) Such a multiplication of state taxes, each measured by the volume of the commerce, would reestablish the barriers to interstate trade which it was the object of the commerce clause to remove. Unlawfulness of the burden depends upon its nature, measured in terms of its capacity to obstruct interstate commerce, and not on the contingency that some other state may first have subjected the commerce to a like burden."

Not only the "risk" of double taxation but double taxation in fact can result from the taxation to the manufacturer of these sales by the City of New York.*

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*Felt & Tarrant Mfg. Co. is advised by its New York City customers that on over $50,000 of sales during the tax period in question, a tax has been paid by the customer on sales for which a sales tax was also collected from the Company.

The State of Illinois has a "Retailer's Occupational Tax", enacted June 28, 1933, and still in effect. Smith-Hurd Revised Statutes (1935), p. 2767; Cahill's Statutes, p. 2389. This is "An Act in relation to a tax upon persons engaged in the business of selling tangible personal property to purchasers for use or consumption". The tax is based upon gross sales.

New York City says it can tax these sales because they are local there. Suppose on the other hand, that Illinois does not agree with this and says that the sales are local Illinois sales and taxable there. In such a case there is double taxation in fact.

Furthermore, there is no prohibition upon the State of Illinois or the City of Chicago from enacting a "Sales Tax" on these very sales. Again, the Company can be subjected to a personal property tax on the machines and materials which it has on hand in Chicago. If New York City is sustained in taxing these sales then various other legislative bodies in Illinois and New York may levy "Use Taxes," "Gross Receipts Taxes," "License," "Privilege" and "Excise" taxes measured by these very sales. Pandora's box is opened.

If New York City can tax the Company for sales to New York customers then every city in the United States and every State may tax such sales when made to its inhabitants. That situation would immediately raise tariff walls around each city and State of the Union which would be destructive not only of interstate commerce but of the very protection which the Commerce Clause was designed to preserve.

Other burdens on interstate commerce in the case at bar consist of the compulsion, under the sales tax law, of the Comptroller of New York City forcing an Illinois corporation to act as a collecting agency for the city; the compulsion of forcing an Illinois corporation to file returns and reports with the City of New York, and the increased costs of accounting and bookkeeping in connection with such returns and the collection of the tax from the Company's

New York customers. All these burdens can be avoided by the collection by the City of New York of any local taxes from the local New York purchasers in New York City.

The City of New York sent auditors to the City of Chicago to examine the Company's books and records. (R. 62, 63) If the City of New York can do this, then every city in the United States which has a sales tax can send its auditors to the company's offices with the result that the Company's offices would be overrun by investigators, auditors, checkers and others, to the utter disruption of its business.

When the City of New York compels an Illinois corporation, which is not authorized to do business in New York, to act as a collecting agency for the City, compels it to file returns, to make reports, and to incur substantial additional costs and expenses, the City is attempting to exercise its sovereign powers beyond its jurisdiction. That is cannot do without burdening interstate commerce.

VI. There is No Discrimination Against New York Manufacturers and Merchants by Invalidating the Tax Herein.

"Comptometers" are computing machines specially manufactured and sold exclusively by the Company under its own patents. Local New York manufacturers do not and cannot manufacture these machines.

Local merchants and manufacturers cannot and do not make or sell these machines. All sales are made by the Company at and from Chicago, Illinois. To hold that these sales taxes were erroneously collected does not discriminate against any local New York City merchant or manufacturer or in fact any manufacturer in the United States. The unjust discrimination theory, therefore, does not apply to the facts in the instant case as it might where a general commodity is sold in competition with local trade.

The Comptroller himself can avoid any unjust discrimination by collecting a personal property tax from New York City purchasers.

VII. The Invalidation of the Tax Under the Particular Facts of this Case Will Not Conflict With Prior Decisions of this Court.

The City urges that the tax should be sustained under the principles announced in certain recent decisions of this Court. A careful analysis of those cases shows that they are distinguishable both on the facts and because of the particular kind of tax levied.

In all of those cases the tax was sustained because of the "local" nature of the activities separate and apart from interstate commerce.

Those decisions involved "Use" taxes on purely local possession or enjoyment of property; Sales taxes on purely local sales; "Personal Property" taxes on purely local ownership; "License" or "Privilege" taxes for doing a local business; and "Excise" taxes based upon local use or business.

These taxes were sustained because of the "local", intrastate nature of the activity engaged in or because the articles were in "local" use. The taxable event was the local use or possession as distinguished from a tax on the sales of goods in interstate commerce.

(a) The "Use" tax cases.

The case of *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U. S. 62; *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167; and *Pacific T. & T. Co.* v. *Gallagher*, 306 U. S. 182; all involved the California "Use Tax"—*not* the California "Sales Tax". This Court held that the "local" use and enjoyment of articles imported from another State was taxable and did not burden interstate commerce.

A "Sales" tax and a "Use" tax differ fundamentally.

A "Sales" tax applies only to a local sale. A "Use" tax, as the name implies, is a tax upon the privilege of owning, using, consuming or enjoying the possession of property and applies to goods, in the hands of the purchaser, owner or user, whether or not they have been trans-

ported from a foreign state or country. In the instant case a "Use" tax, or the corresponding New York City "Personal Property" tax, applies to the New York City purchaser and *not* to the Illinois manufacturer. In the case at bar the City is taxing the Illinois manufacturer for "Sales" taxes and not the New York City purchaser.

The case at bar does *not* involve a New York City *purchaser-consumer* but it *does* involve an Illinois *manufacturer-seller*. The distinction is obvious.

The California decisions would be applicable if a New York City purchaser sued to recover the "Personal Property" tax paid by him on a comptometer upon which the sales tax had not been paid. Because of "local" possession, ownership and use the tax would of course be sustained. Otherwise the cases bear no analogy.

Henneford v. *Silas Mason Co.*, 300 U. S. 577, involved a "use" or "excise" tax on the privilege of using articles imported in interstate commerce which had become part of the common mass of property at rest in the State. It was a tax upon the "local" privilege of "local" use.

(b) The "Sales" tax cases.

Bankers Brothers Company v. *Pennsylvania*, 222 U. S. 210, involved the local sale of an automobile by a local dealer. The contract of sale was executed locally, the purchase price was received locally and delivery was local. This Court distinguished the case of "a sale by the manufacturer at the factory" holding that "the contract was made in Pennsylvania, and was there to be performed by the delivery of the automobile and the payment of the balance of the purchase price." All of the incidents of the transaction were "local" and constituted a local sale in Pennsylvania.

Wiloil Corporation v. *Pennsylvania*, 294 U. S. 169, involved a tax of 3 cents a gallon levied "upon all liquid fuels used or sold and delivered by distributors within the commonwealth." In that case the company, with its principal place of business in Pittsburgh, sold liquid fuels at

wholesale and was a "distributor" as defined by the Act. The Philadelphia agent of the company ordered 13 tank cars for delivery to purchasers in Philadelphia and Essington, Pennsylvania. The order specified a price per gallon "f. o. b. Wilmington, Del., plus 3 cents tax" and was received at the company's office in Pittsburgh for approval. The company obtained the fuel at Wilmington and *on the order of the company* it was shipped by rail from there to the purchasers in Pennsylvania. This Court said that the commerce clause does not prevent taxation of goods by the State in which they are found merely because brought from another State, and held that an "interstate transportation was not required or contemplated." The sales contracts were made in Pennsylvania, the company was doing business in Pennsylvania and deliveries were made in Pennsylvania. Under such circumstances the whole transaction and all of its incident were local and subject to tax.

(c) The "Gross Receipt", "License" or "Privilege" tax cases.

Graybar Electric Co. v. *Curry*, 189 So. 186, 308 U. S. —, affirmed 60 S. Ct. Rep. 139, on the authority of *Banker Bros. Co.* v. *Pennsylvania*, 222 U. S. 210; and *Wiloil Corporation* v. *Pennsylvania*, 294 U. S. 169, involved purely "local" sales and is therefore distinguishable on its facts. The tax involved was a "license" tax imposed on local retail dealers measured by "local" gross receipts. Graybar was not a foreign manufacturer but a "local" retail distributor of electrical supplies in Birmingham, Alabama. The orders were addressed to "Graybar Electric Company, 1529 First Avenue North, Birmingham, Alabama." The orders were accepted by Graybar in Alabama. Graybar from Alabama then ordered the goods from General Electric in Ohio. General Electric billed Graybar in Alabama. Graybar in turn billed its Alabama customers and received the purchase price in Alabama. The goods could have been purchased in Alabama from a competitor of Graybar and part of the goods were carried in stock in Alabama. The tax was sus-

tained because of these "local" transactions resulting in the "local" receipt by Graybar of "gross receipts" in Alabama.

Western Live Stock v. *Bureau*, 303 U. S. 250, involved a "privilege tax" measured by gross receipts from "business done" (advertising) locally within the State. This Court held that the tax was "an excise conditioned on the carrying on of a local business." (p. 257) This Court emphasized the fact that the tax did "not embrace the purchase price of the articles shipped in interstate commerce" (pp. 258-259). Receipts from subscriptions to the magazine from without the State and the circulation of the magazine interstate were *not* included in the measure of the tax.

Adams Mfg. Co. v. *Storen*, 304 U. S. 307, involved the Indiana Gross Income Tax based upon "gross receipts derived from trades, businesses, or commerce." This Court held it was a "privilege tax" upon the receipt of gross income and since under the statute interstate commerce would be subjected to the "risk of a double tax burden" the tax was held to be a burden upon such commerce.

Minnesota v. *Blasius*, 290 U. S. 1, involved a personal property tax. Cattle shipped from another State were at rest in the St. Paul stockyards when purchased by the defendant. They were there being held at the pleasure of their owner for disposal or use. This Court held that they had acquired a local "situs", and, being locally owned as part of the general mass of property within the State, the defendant was subject to the personal property tax on such ownership although he later sold and shipped them to another State.

The case last above would be applicable to a New York City purchaser under the New York "Personal Property" tax.

(d) The "Privilege", "Excise" and "Use" tax cases.

Coverdale v. *Pipe Line Co.*, 303 U. S. 604, involved a "privilege" tax on the "local" operation of machines for producing mechanical power. The tax was measured by

the horsepower capacity of the machine used. The tax was laid on a "local" business and a purely local "use".

Nashville C. & St. L. Ry. Co. v. *Wallace*, 288 U. S. 249, involved a "privilege" or "excise" tax on the withdrawal for use of gasoline "locally" stored. The same was true in *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472, and *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86, the latter tax being characterized as a "license fee", an "excise", upon the "local use" of motor fuel in the State.

And *Edelman* v. *Boeing Air Transp.*, 289 U. S. 249, involved a "license" or "use" tax on the withdrawal of gasoline "locally" stored within the State.

Bacon & Sons v. *Martin*, 305 U. S. 380, involved an "excise" tax based upon the "use" of cosmetics locally within the State after importation.

Ware & Leland v. *Mobile County*, 209 U. S. 405, involved a "license tax" on persons engaged in buying and selling cotton futures and this Court held that the business was "local" and subject to tax. (But see the distinction made on page 412 as to orders taken for the sale of goods to be shipped from another State.) The same principles controlled in *Moore* v. *N. Y. Cotton Exchange*, 270 U. S. 593, because of the "local" business done and the "local" nature of the "transactions".

Postal Tel.-Cable Co. v. *Richmond*, 249 U. S. 252, involved a "license tax" on the "local" business done within the City for the "privilege of doing business" therein.

It is submitted that the differences in the nature of the taxes levied, in the cases discussed above, as well as differences in the facts make them clearly distinguishable from the New York City sales tax imposed upon the Illinois manufacturer in the case at bar.

VIII. Factual Distinctions Present in the Case at Bar.

Here the order is directed to a foreign manufacturer in Chicago, Illinois. The order is accepted or rejected in Chicago. The machine by serial number is appropriated to the order in Chicago and is shipped to the purchaser in

interstate commerce. The purchaser is billed from Chicago and remits direct to Chicago. Thus the elements of a "local" sale are lacking and the elements upon which the particular tax was sustained in the cases discussed above are absent.

The attempt of the City to bring the instant case within the principles of the "Use" tax cases fails because New York City has no "Use Tax." Its counterpart, the "Personal Property Tax," can only be employed against the purchaser—not the foreign manufacturer.

Again the principles of the "storage" and "withdrawal" cases have no application because there was no storage or withdrawal. The record shows that the Company did not have extensive storage facilities in New York City used for the storage of machines for "sale" (R. 28, 32, 38, 40, 45, 46) and the only machines stored were used for trials, repair loans and demonstration. (R. 37, 40, 47, 48) These machines are *not* the subject of the sales taxes in issue in the case at bar. Obviously a service machine used for trials, repair loans or demonstration was, by reason of its very use, a second-hand machine. They went in and out every day. (R. 48) Furthermore, the Company did not sell second-hand machines but new machines.

The testing of the machine before delivery to the customer was in furtherance of interstate commerce under the principles of *Dozier* v. *Alabama*, 218 U. S. 124; *Rearick* v. *Pennsylvania*, 203 U. S. 507; *Caldwell* v. *North Carolina*, 187 U. S. 622; and *Crenshaw* v. *Arkansas*, 227 U. S. 389.

Servicing of the machine, free of charge, under the one year guarantee has no application in the imposition of a sales tax as it begins after the sale is consummated.

CONCLUSION.

The decisions below are correct and in accord with the decisions of this Court. They should be affirmed.

Respectfully submitted,

NEWTON K. FOX,
Attorney for Respondent.

APPENDIX A.

Laws of New York Provisions of State Enabling Act. Chapter 873.

Section 1. Notwithstanding any other provision of law to the contrary, any city of the State having a population of one million inhabitants or more acting through its local legislative body, is hereby authorized and empowered until December thirty-first, nineteen hundred thirty-five to adopt and amend local laws imposing in any such city any tax and/or taxes which the legislature has or would have power and authority to impose to relieve the people of any such city from the hardships and suffering caused by unemployment and make provision for the collection thereof by the chief fiscal officer of any such city. The tax or taxes imposed pursuant to such local laws shall be effective only during the period commencing when this act becomes effective and ending December thirty-first, nineteen hundred thirty-five, or any portion of such period. *A tax imposed hereunder shall have application only within the territorial limits of any such city and shall be in addition to any and all other taxes.* [Italics ours.]

* * *

This act shall not authorize the imposition of a tax on any transaction originating and/or consummated outside of the territorial limits of any such city, notwithstanding that some act be necessarily performed with respect to such transaction within such limits. [Italics ours.]

This act shall not authorize the imposition of a tax on a non-resident of such city or on account of any transaction by or with a non-resident of such city, except when imposed without discrimination as between residents and non-residents, on account of tangible property actually located or income earned, or trades, businesses or professions carried on within such city, or on account of transfers, retail sales or other transactions actually made or consummated within

such city by a non-resident while within such city. A corporation shall not be deemed a non-resident by reason of the fact its principal place of business is not within the city.

* * *

APPENDIX B.

Local Laws of the City of New York.
Sales Tax.

For the Year 1934, No. 20 as amended by No. 24.

* * *

§1. Definitions. When used in this local law:

(a) The word "person" includes an individual, copartnership, society, association, joint stock company, corporation, estate, receiver, trustee or any other person acting in a fiduciary capacity, and any combination of individuals;

(b) The word "vendor" means a person selling property or rendering services upon the receipts from which a tax is imposed under section 2 of this local law;

(c) The word "purchaser" means a person who purchases property or to whom are rendered services, receipts from which are taxable under section 2 of this local law;

* * *

(e) The word "sale" or "selling" means any transfer of title or possession or both, exchange or barter, license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, and may include the rendering of any service specified in section 2 of this local law;

* * *

(g) A "retail sale" or "sale at retail" means a sale to a customer, or to any person for any purpose other than for resale in the form of tangible personal property;

* * *

§ 2. Imposition of tax. During the period commencing on December tenth, nineteen hundred and thirty-four, and ending on December thirty-first, nineteen hundred and thirty-five, there shall be paid a tax of two per centum upon the amount of the receipts from every sale in the city of New York of:

(a) Tangible personal property sold at retail, except those articles described in schedule "A" below;

* * *

Receipts from sales or services by or to the state or city of New York, and receipts from sales or services by or to semi-public institutions, and *receipts upon which the state of New York and city of New York are by virtue of the provisions of the constitution of the United States or otherwise without power to impose a tax shall not be subject to tax hereunder.* [Italics ours.]

* * *

Where a purchaser has failed to pay and a vender has failed to collect a tax upon a sale or service, as imposed by this local law, *then* in addition to all other rights, obligations and remedies provided, *such tax shall be payable by the purchaser directly to the comptroller* and it shall be the duty of the purchaser to file a return thereof with the comptroller and to pay the tax imposed thereon to the comptroller within fifteen days after such sale was made or service rendered. [Italics ours.]

The *comptroller* may, wherever he deems it necessary for the proper enforcement of this local law, *provide* by regulation *that the purchaser shall file returns and pay directly to the comptroller the tax herein imposed,* at such times as returns are required to be filed and payment over made by vendors. [Italics ours.]

APPENDIX C.

New York City Personal Property Tax.

Sec. 1. Imposition of Tax. During the period commencing on January 1, 1935 and ending on December 31, 1935, there shall be paid by the owner a tax of 2 per centum upon the value of the following-named *articles of personal property situated or owned within the City of New York.*

* * *

e. Machinery of every type and variety, including *typewriters and all other business machinery* * * *.

Sec. 2. Exemptions. No tax, as imposed by Section 1 of this title shall be due or payable in any event upon any of the articles enumerated in the said section 1, and no return need be made thereon pursuant to the provisions of this law if any of the following conditions be demonstrated to the satisfaction of the Comptroller.

* * *

c. That the said article is one *upon the receipt from the sale of which a tax has been paid* pursuant ot the provisions of this law or Local Law 20, of 1934, as amended. [The City "Sales Tax"] (Italics ours).

* * *

P. 1-2

SUPREME COURT OF THE UNITED STATES.

Nos. 45, 474.—October Term, 1939.

Joseph D. McGoldrick, Comptroller of the City of New York, Petitioner, vs. Felt & Tarrant Mfg. Co.	On Writ of Certiorari to the Supreme Court of the State of New York.
Joseph D. McGoldrick, Comptroller of the City of New York, Petitioner, vs. A. H. DuGrenier, Inc., Principal, and Stewart & McGuire, Inc., Agent.	On Writ of Certiorari to the Supreme Court of the State of New York.

[January 29, 1940.]

Mr. Justice Stone delivered the opinion of the Court.

These are companion cases to No. 475, *McGoldrick* v. *Berwind-White Coal Mining Co.*, decided this day. As in that case the question for decision is whether the New York City tax laid upon sales of goods for consumption as applied to respondents infringes the commerce clause of the Federal Constitution.

Upon certiorari to review determinations by the Comptroller of the City of New York, that each of the respondents was subject to the tax, the Appellate Division of the New York Supreme Court set the levy aside. *Matter of Felt & Tarrant Mfg. Co.*, 254 N. Y. App. Div. 246; *Matter of A. H. DuGrenier, Inc.*, 255 N. Y. App. Div. 961. The New York Court of Appeals, without opinion, affirmed the judgment in each case, 279 N. Y. 678, 281 N. Y. [illegible], but by its amended remittitur declared that the affirmance was upon the sole ground that the tax infringed the commerce clause of the Federal Constitution. The relevant provisions of the taxing act are set out in our opinion in the *Berwind-White Company* case and need not be repeated here.

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Respondent, Felt & Tarrant Mfg. Co., an Illinois corporation, with its factory and principal place of business in that state, manufactures and sells adding and calculating machines known as

comptometers. It maintains an office in New York City, from which its agents solicit in the city orders for comptometers, which are forwarded to the Illinois office for approval. If accepted each order is filled by allocating to it the purchased comptometer designated by its serial number. It is invoiced to the purchaser and shipped to the New York City office of respondent's sales agent, where it is inspected, tested and adjusted, and then delivered to the purchaser. Remittances are made by the purchaser direct to the Illinois office. The course of business so far as now material is identical in that of the same company, described in *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U. S. 62.

Respondent, DuGrenier, Inc., a Massachusetts corporation with its factory and principal office in that state, is engaged in the manufacture and sale of automatic vending machines. They are sold throughout the United States by an exclusive sales agent, the respondent Stewart & McGuire, Inc., having an office in New York City. The sales in the city, when not of machines located at the New York office, are effected through solicitations of orders by the agent, which takes from the prospective purchaser a signed order or a contract for a conditional sale on partial payment, which is forwarded by the agent to the Massachusetts office. If accepted there the order is filled by shipping the purchased machine by rail or truck direct to the purchaser in New York City, who pays the freight.

In both cases the tax was imposed on all the sales of merchandise for which orders were taken within the city and possession of which was transferred to the purchaser there. Decision in both is controlled by our decision in the *Berwind-White Company* case. For reasons stated at length in the opinion in that case the tax so laid does not infringe the commerce clause. The judgments will be reversed and the causes remanded for further proceedings not inconsistent with this opinion.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

Nos. 45, 474.—October Term, 1939.

Joseph D. McGoldrick, Comptroller of the City of New York, Petitioner, 45 *vs.* Felt & Tarrant Mfg. Co. Joseph D. McGoldrick, Comptroller of the City of New York, Petitioner, 474 *vs.* A. H. DuGrenier, Inc., Principal, and Stewart & McGuire, Inc., Agent.	}	On Writs of Certiorari to the Supreme Court of the State of New York.

[January 29, 1940.]

The Chief Justice, Mr. Justice McReynolds and Mr. Justice Roberts dissent from the judgments in these cases upon the grounds stated in the dissenting opinion in No. 475, *McGoldrick* v. *Berwind-White Coal Mining Co.*